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AMERICAN BAR ASSOCIATION

JOVRNAL

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Federal Legislation for 1930

VOL. XVII No. 2

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AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XVII FEBRUARY, 1931 NO. 2

New Jersey Judicial Council Presents First Report to Governor

THE Judicial Council of New Jersey presented its first report to the Governor on Dec. 15. The Council was organized in 1930 with Mr. Arthur T. Vanderbilt as chairman, and its report shows that it has been creditably active during the brief period of its existence.

Its first problem after organization, according to the report, was the collection of data showing the present status of litigation in the several civil courts throughout the state as well as the growth of such litigation since 1900. The figures showed an unanticipated and very large increase in litigation in the period mentioned, amounting to 980 per cent in the county courts and 897 per cent in the district courts. Congestion was also shown in the Court of Errors and Appeals, and conditions seemed about the same in the Supreme Court. The Council regarded the situation thus created as constituting a critical problem. Obviously it was calculated to cause delay and thus work injustice to litigants.

This suggested a consideration and restatement of the "fundamental rights of litigants," as a measure or norm to which the administration of justice should be made to conform as nearly as possible. On this subject the report says:

"The gravity of this problem presented by the foregoing statistics necessarily led the Judicial Council to a consideration of the fundamental rights of a litigant. Once his fundamental rights have been stated, the task is to make recommendations for the accomplishment thereof.

"In our judgment a litigant is entitled to: (1) A prompt and efficient trial of his case; (2) At reasonable cost; (3) Represented by competent attorneys; (4) Before impartial, experienced and competent judges: (5) With the privilege of a review of the trial court's determination by an appellate tribunal composed of similar judges who will render a final decision within three to four months after the appeal is initiated.

"(1) Obviously our Courts have found themselves unable to meet at least part of the first test of what is due a litigant. By a prompt trial we mean the disposition of a commercial case within two months after issue joined. In a commercial age where business is largely dependent upon credit, any greater delay amounts to a denial of justice. In tort cases it is reasonable that a somewhat greater period of time elapse so that the true extent of the injuries complained of may be more accurately ascertained, but it would seem unjust to an injured party to withhold a trial from him for more than four to six months after issue joined.

"By an efficient trial we mean a business-like and satisfactory disposition of the case once it is reached for trial. Without pretending that we have achieved Utopia, we think we may point with pride to the fact that the system of pleading and practice in our law Courts under the Practice Acts of 1903 and 1912 is well in advance of that in operation in most states of the Union. While there is considerable to be desired in the way of an efficient disposition of preliminary motions and the establishment of a simplified and complete system for referring certain types of cases to referees (all of which will be dealt with hereafter), nevertheless, the essential fact remains that in New Jersey pleadings are simplicity itself; little time is consumed in drawing juries; in general, only meritorious exceptions are taken at trial; and very few cases are appealed and reversed on questions of procedure. This is a great credit to our Courts and carries with it a lasting tribute to the wisdom of the late Charles H. Harts-

horne, the draftsman of the Practice Act of 1912.

"(2) While no complete investigation of the subject of costs has been attempted, it is believed that the cost to the litigant and the cost to the public at large of litigation in this State does not compare unfavorably with that in other states.

"(3) The responsibility for competent attorneys to try cases rests primarily upon the law schools, the character committee of the local Bar association, the State Board of Bar Examiners and the Supreme Court. Considerable progress in the direction of an improvement in this respect is noted. The Supreme Court, on its own motion, last spring appointed a committee of the Bar to make full recommendations with respect to the admission and qualification of attorneys, and the report of that committee is now in the hands of the Supreme Court. In addition, hardly a meeting of any one of the county bar associations is held without there being some forward-looking recommendation made for improvement in this matter. Apparently both the bench and bar are alive to the importance of the topic.

"(4) Impartial, experienced and competent judges have been the rule in this State. In our judgment this is due, first, to the method of appointment by the Governor with the advice and consent of the Senate, and, secondly, to their having been selected, so far as the Judges of the Court of Errors and Appeals, the Supreme Court Justices, the Vice Chancellors and the Circuit Court Judges are concerned, on a bi-partisan basis, so that each Court is equally divided as far as may be possible between the two major political parties. This practice is not prescribed by any constitutional provision, but the tradition is so firmly rooted and the good results which flow from it are so apparent that it is difficult to believe that the appointing party would ever attempt to depart therefrom.

"For this reason we will recommend that the Judges of the Common Pleas Court in first and second class counties be precluded from the practice of law as are the judges of the higher courts, and be put upon the same basis as to tenure of office as the judges of the courts hereinbefore referred to.

"We believe, moreover, that so far as economically practicable, all judges should be precluded from the practice of law. It is unfair both to litigants and lawyers that any man should be a judge one hour of the day and attorney the next. For this reason we will recommend that District Court Judges, in first class cities at least, be made full time Judges, be precluded from the practice of law, and be placed on a bi-partisan basis.

"(5) As to appeals, we believe the litigants are entitled to a decision within three to four months after the appeal is taken. The accomplishment of this may require a constitutional amendment, but we believe the present situation may be very considerably alleviated by certain suggestions which we will now present."

The recommendations thus referred to are made with the object of affording a certain measure of relief to the Court of Errors and Appeals, such as is possible without a constitutional amendment—(1) by lightening the work in the Supreme Court of the Justices of the Supreme Court, who are also Judges of the Court of Errors and Appeals, and (2) by changing the scheme of argument in the Court of Errors and Appeals to conform more nearly to the practice prevailing in the United States Supreme Court, New York Court of Appeals and the United States Circuit Courts of Appeals generally.

Bearing on the first point, the Council recommended that "rules to show cause in the Supreme Court be heard by the Circuit Court Judge who tried the case and that appropriate rules or legislation be adopted reserving exceptions on rules to show cause on Supreme Court issues and making them available on appeal except where the questions involved are argued on the return of the rule to show cause"; that Supreme Court Justices be relieved in all counties from the trial of homicide cases; that "a respondent in any matter in the Supreme Court be given the right, on being served with a notice of appeal to the Supreme Court, to inform his adversary that he will consent to a pro forma judgment without prejudice in the Supreme Court in order to expedite the final disposition of the case by the Court of Errors and Appeals"; that District Court Appeals be heard before a single Justice of the Supreme Court on a typewritten copy of the record below, and that such appeals be decided on memorandum opinions which need not be printed or published.

The Council also suggests for the consideration of the Justices of the Supreme Court that "where cases are to be submitted on briefs, the briefs be filed at the opening of the term, and that four weeks intervene between the opening of a term of the Supreme Court and the opening of the following term of the Court of Errors and Appeals. If this suggestion be adopted, it would seem that all of the cases argued at a given term of the Supreme Court, except where some extraordinary difficulty was encountered, might readily be disposed of before the opening of the next term of the Court of Errors and Appeals. . . . With this accomplished, we suggest for the consideration of the Justices of the Court of Errors and Appeals:

"That the Court of Errors and Appeals change its rules to provide for one term of Court a year, such term to open four weeks after the opening of the fall term of the Supreme Court and to be a continuous term save for the two four-week periods of interruptions occasioned by the February and May terms of the Supreme Court, to the close of the Court occasioned by the summer vacation. We suggest further that cases be called for argument only one or two days a week while the Court of Errors and Appeals is in session, as above set forth, and that it be recalled when the Court shall have decided cases previously before it and shall desire new cases for argument. This is substantially the plan in force in the United States Supreme Court, New York Court of Appeals and the several Federal Circuit Courts of Appeal. It is believed that this system whereby conference follows promptly upon argument will expedite the work of the Court to a marked degree."

The tremendous increase in the number of cases listed for trial in the Supreme Court Circuits, Circuit Courts and Common Pleas Courts of the several counties, according to the report, present a problem to which the only fundamental answer is that there must be more judges devoting their time to the civil work in the courts of the several counties. This means either the appointment of

additional Circuit Court judges or the employment of full time Common Pleas judges to assist in the trial of circuit issues. The Council approved the latter plan, for reasons which are fully set forth in the report, and its recommendation took the form that "appropriate legislation be enacted to provide that Common Pleas judges in counties of the first and second class be prohibited from engaging in the practice of law in any of the Courts of the State and that the salaries of all such judges of the Common Pleas Court hereafter appointed in and for such counties shall be $15,000 per annum." However, some minor degree of relief, says the report, may be obtained through the practice of referring cases involving complicated accounts and other cases to Referees for decision and report to the Court. Several recommendations are made for the purpose of increasing the efficiency of such references.

The report states that the "existence of the Council has been too short to permit a complete survey of the District Courts but after full consideration of the facts thus far assembled it was determined that the Judicial Council recommend as a temporary measure for immediate relief that appropriate legislation be enacted to provide (1) that in any county where there is a city of the first class there be a presiding judge of the District Courts for such county designated by the Supreme Court Justice presiding in that county, such presiding judge to himself sit or assign a judge to sit in each established court room in the county and fix and promulgate the schedule of sittings, and (2) that in the first class cities the judges of the District Courts should give their full time to their judicial work, be prohibited from practicing law and be paid adequate salaries commensurate with their position; and (3) that all District Courts be reorganized so that the District Courts shall be courts of the county and be treated as an integral part of the county judicial system."

The report concludes with a recommendation that the jury commission hereafter consist of one commissioner to be appointed by the Justice of the Supreme Court presiding in the county to hold office at the pleasure of such Justice of the Supreme Court. It is signed by the members, as follows: W. Holt Apgar, Charles L. Carrick, Clarence E. Case, Harry R. Coulomb, Nelson Y. Dungan, William W. Evans, Dallas Flannagan, Frank B. Jess, Vivian M. Lewis, William E. Stevens, Russell S. Wise, Joseph G. Wolber, Arthur T. Vanderbilt, Chairman, and H. Edward Toner, Secretary.

Law School Added to Approved List

THE Albany Law School, situated at Albany, New York, which is a department of Union University, was added to the approved list of the American Bar Association by the Council on Legal Education and Admissions to the Bar, at its meeting in Chicago on December 28, 1930. This makes a total of seventy-five schools which have been approved.

It was announced at the Council meeting that the following committee had been appointed by the Chairman to arrange for the Conference of Bar Examiners to be held under the auspices of the Section of Legal Education and Admissions to the Bar at the time of the American Bar Association meeting in Atlantic City next September: Philip J. Wickser, Secretary and Treasurer of the New York State Board of Law Examiners, of Buffalo, New York, Chairman; Walter C. Douglas, Jr., Secretary of the State Board of Law Examiners of Pennsylvania, of Philadelphia, Pennsylvania; Stuart B. Campbell, member of the Virginia Board of Law Examiners, of Wytheville, Virginia; Charles P. Megan, member of the Illinois Board of Bar Examiners, of Chicago, Illinois; and William E. Hutton, member of the Bar Committee of Colorado, of Denver, Colorado.

President Boston Helps Dedicate Court House at Mississippi Capital

PRESIDENT CHARLES A. BOSTON delivered the principal address at the dedication of the new million dollar Hinds County Courthouse at Jackson, the capital city of Mississippi, on December 16. His subject was "The Majesty of the Law," and the building which he helped to dedicate to the purposes of Justice fittingly symbolized the idea in stone. The ceremonies took place in the circuit court room and the program was broadcast over the local radio station.

Mr. H. V. Watkins, counsel for the Hinds County Board of Supervisors, was the master of ceremonies on this interesting occasion. Mr. Watkins was also chairman of the committee on arrangements and was mainly responsible for the striking program scheduled. The invocation was delivered by Dr. Walter B. Capers, after which Hon. Marcellus Green, of the Jackson Bar, presented to the county a portrait painting of the late Judge Wiley P. Harris, one of the most distinguished lawyers in the history of the State, and delivered an address eulogizing the life and character of the late jurist. Chief Justice Sidney Smith, of the Supreme Court of Mississippi, then introduced President Boston, who delivered his address.

In the evening there was a banquet at which President Boston was the guest of honor. Mr. J. O. Sanders, President of the Hinds County Bar Association, was the master of ceremonies. Dr. H. M. King delivered the invocation. Judge Garland G. Lyell proposed a toast in honor of the distinguished guest and President Boston responded appropriately.

The new structure, according to the accounts in the local newspapers, seems to be the last word in convenience for all concerned, voluntarily or involuntarily, in the administration of justice in the

Handsome new Court House recently dedicated at Jackson, Mississippi

lower courts, and in the transaction of the county's other business. The basement floor houses the county health unit and the Sheriff's receiving department, the latter being equipped with showers and disinfecting apparatus for the proper handling of persons who are to be taken to the jail portion of the building, on the fourth and fifth floors, for confinement. An elevator communicates directly from the basement with these floors. The County Engineer also has his office on the basement floor and there is a large vault for the records of the Chancery Clerk's office.

The offices of the Sheriff and the Chancery Clerk are on the first floor, while the second is occupied principally by the court rooms of the Circuit, Chancery and County Courts, all with necessary accommodations. The Circuit Court has been provided with a complete set of witness and jury rooms and a cell for the confinement of prisoners. The Superintendent of Education's department, the grand jury room and the Home and Farm Agent's Department are on the third floor, which also contains kitchen and dormitory accommodations for jurors. The jail is located on the fourth and fifth floors, the former being devoted exclusively to women and juvenile prisoners and the fifth to male prisoners and condemned prisoners. The fourth floor also contains two hospital wards and the kitchen and laundry for the jail.

The building is a handsome structure of stone, in modernized Greek style. It has a number of striking architectural details which, unfortunately, do not show clearly in the photograph.

Sufficiency of Finger Prints Alone to Sustain Conviction

AN interesting opinion holding that a conviction may be sustained on finger prints alone, without any other evidence, was recently handed down by Hon. Frank B. Wickersham, one of the judges of the Twelfth Judicial District of Pennsylvania, in overruling a motion for a new trial. It is said to be a case of first impression in this country. There are of course plenty of cases holding that finger prints are admissible in evidence, but this one goes to the point of holding that finger prints are alone sufficient to sustain a conviction.

The print in this case was found on a piece of a pane of glass which had been broken in order to effect an entrance to the house. The pane in question had been washed and cleaned the very afternoon of the crime. It was naturally not known at the time whose finger print it was, but several weeks later the defendant was arrested on another charge and a comparison of the finger prints taken on this occasion with that found on the piece of broken glass showed that one of them was identical with the latter print in twenty-two particulars. The expert testimony was direct to the effect that the two prints were of the same finger, and "largely on the uncorroborated testimony of the finger print expert and the photographs of the finger prints themselves" the jury convicted the defendant.

The motion for a new trial was pressed principally on the point that the above evidence was insufficient, when "uncorroborated by any other evidence identifying the defendant as the one who

committed the crime." Judge Wickersham, in his opinion, gave an interesting resumé of the history of finger prints as a means of personal identification, as well as extracts from a number of decisions on the subject. He then pointed out that there was really some corroboration, as the defendant was seen in the vicinity on the evening the crime was committed. But the real ground of the decision is given on the following extract from the opinion:

"In the case of *Parker, Appellant, and The King, Respondent,* 14 C. L. R. (Australia) 681, 3 British Ruling Cases, 68, it was held:

" 'Where it is proved that a crime has been committed, resemblance of finger prints may of itself, in connection with other circumstances, be sufficient evidence of the identity of an accused person with the person who committed the crime charged.' "

"Writing the opinion of the Supreme Court of Victoria, it was said by Griffith, C. J.:

" 'We are asked to allow the point to be argued whether, when evidence of finger prints is the only evidence of identity, it is sufficient to support a conviction. Leave is asked in the hope that the rule may be laid down that it is not. Signatures have been accepted as evidence of identity as long as they have been used. The fact of the individuality of the corrugations of the skin on the fingers of the human hand is now so generally recognized as to require very little, if any, evidence of it, although it seems to be still the practice to offer some expert evidence on the point. *A finger print is therefore in reality an unforgeable signature.* (Italics ours). That is now recognized in a large part of the world, and in some parts has, I think, been recognized for many centuries. It is certainly now generally recognized in England and other parts of the English dominions. If that is so, there is in this case evidence that the prisoner's signature was found in the place which was broken into, and was found under such circumstances that it could only have been impressed at the time when the crime was committed. It is impossible under those circumstances to say there was no evidence to go to the jury.' "

"We think the last quoted case is controlling in the instant case. We are impressed with its reasoning. There is in the instant case evidence that the prisoner's '*unforgeable signature*' was found in the place which was broken into and was found under such circumstances that it could only have been impressed at the time when the crime was committed. The window in this door had been washed by Mrs. Grove at three o'clock in the afternoon and had not been touched by either herself or her husband after that time. The defendant's '*unforgeable signature*' was found on a piece of broken glass taken from the door by means of which he unlocked it on the inside and entered the house. We think the evidence was sufficient to support the conviction and the motion for a new trial is therefore overruled."

Code of Ethics of Practitioners Before Interstate Commerce Commission

THE Code of Ethics adopted at the last meeting of the Practitioners before the Interstate Commerce Commission, held in Washington on Oct. 30 and 31, 1930, has been received in its amended and final form by the Journal. It is particularly interesting because of the dual character of the membership of the organization by which the Code has been adopted. As stated in the January issue of the Journal, the membership is composed of lawyers who have been regularly admitted to practice law and others having traffic or other technical experience qualifying them to aid the Commission in administration of the Interstate Commerce Act and related Acts of Congress. While the canons apply to both classes alike, they do not, we are told, "release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound."

An examination of the canons shows that the lawyer's view of the proper conduct of practitioners before a tribunal has been controlling. The first canon, for instance, states that the standards of ethical conduct required of practitioners before the courts of the United States are taken as "the basis for these specifications, modified in so far as the nature of the practice before the Commission requires." The greater part of the canons which follow are largely taken verbatim from the Canons of the American Bar Association, with only minor modifications. For instance, Canon 7, "The Practitioner's Duty in the Last Analysis," is practically the corresponding canon in the Bar Association's Code, and Canon 23, "How Far a Practitioner May Go in Supporting a Client's Cause" is likewise a practical reproduction of the Bar Association's rule.

Canon 28, which deals with the discussion of pending litigation in the public press, is much more liberal than the corresponding canon in the Bar Association Code. The latter declares that "newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned," and not to be made except where the "extreme circumstances of a particular case justify a statement to the public." On the other hand, the former canon naturally reflects the obvious fact that a newspaper publication can have no such effect on the Commission as it may have on public opinion and in consequence on juries, and the further fact that the subject of controversy may be a matter of real and great public interest. It therefore says that "it is not against the public interest or unfair to the Commission that the facts of pending litigation shall be made known to the public through the press in a fair and unbiased manner and in dispassionate terms. Practitioners should themselves avoid, and should counsel their clients against, giving to the public press any press notices or statements of a nature intended to inflame the public mind, to stir up possible hostility toward the Commission, or to influence the Commission's course and judgment as to pending or anticipated litigation. When the circumstances of a particular case appear to justify a statement to the public through the press, it is unethical to make it anonymously."

On the subject of "Fees" the canons follow the general principles of the Bar Association Code, both as to division, which is not to be made "except with a member of the bar or with another prac-

titioner, based upon a division of service or responsibility." As to fixing the amount, however, the canon dealing with this point does not go into the things which ought to be considered in this connection, as does Canon 12 of the Bar Association's Code. On the subject of "Intermediaries" the wording of the second paragraph, dealing with the acceptance of employment to render services to an organization, is, in part, as follows: "This employment should only include the rendering of such services to the members of the organization in respect to their individual affairs as are consistent with the free and untrammeled performance of his duties to the Commission." It will be recalled that the corresponding provision in the Bar Association's Canon is that "this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs," and this rule would apply to the lawyer members of the Association of Practitioners.

A British Account of the Recent Visit of Lawyers to America

A DIARY of the visit of English, Scottish, Irish and French lawyers to America in August, 1930, as guests of the American Bar Association, has just been printed in pamphlet form in London under the title "Lawyers on Holiday." The diary is the day-by-day record of the trip made by Mr. Tilney Barton and printed in successive installments in the Solicitors' Journal. It makes most entertaining reading and is quite appreciative of the efforts of both the American and Canadian hosts to make the visit enjoyable.

There is a foreword by Mr. J. Leonard Crouch, who acted as Honorary Secretary to the Reception Committee in London when American lawyers visited England in 1924 and who was a member of the party of English lawyers who came over to return the visit this year. Mr. Crouch is also very appreciative in his comment on the hospitality extended on this side. "They bestowed upon us," he said, "deeds and words of kindness and generosity that knew no bounds and which at times were almost embarrassing in their profuseness."

Meeting of Council of American Law Institute

THE significant recognition that has come to the Code of Criminal Procedure, recently published in its final form, is particularly dwelt on in the report of Herbert Goodrich, Adviser on Professional and Public Relations of the American Law Institute, to the Council of that organization at the meeting held in New York City Dec. 18-21, 1930. "In the Annotated Code of Criminal Procedure of Louisiana," says the report, "which has just been published, the statement is made, following Article 97: 'This article and most of the other articles of this Code on the subject of bail, are predicated upon recommendations of the American Law Institute Code of Criminal Procedure, Draft No. 1.' In Ohio, the 1930 Code, upon the subjects of Arrest, Preliminary Examination, Indictment and Grand Jury, makes official references to the American Law Institute Code of Criminal Procedure as the source of many of the sections. In other sections there is reference to Michigan statutes upon the subject matter of the section which in turn were taken by the Michigan Commission from the Institute's Code.

"These adoptions of the Code were made, it will be remembered, before the work was completed and the Code approved by the Institute. They are additional proof that the Code supplies a genuine public need at exactly the right time. It is yet too early to predict what legislative recognition will be given it this winter. But the Reporters and their staff are giving all the help possible in States where any interest is manifested."

Elaborating on the subject of the favorable reception being accorded this particular work of the Institute, Mr. Goodrich says:

"Portions of the Code of Criminal Procedure have already been adopted by five states either by statutes or action of Judicial Council. These are: Michigan, Ohio, Louisiana, Iowa and Connecticut. We are informed that the Ohio Commission which previously recommended the adoption of certain sections upon Arrest, Preliminary Hearing and Bail, is preparing to recommend other sections of the Code for adoption. Another chapter, concerning Waiver of Jury, has been endorsed by the Iowa Bar Association and will be pressed for passage at the coming legislative session.

"The proposals of Judicial Councils in Illinois include some matter concerning criminal procedure. Practically all of the material on this subject has

been taken from the Code. Committees in Colorado and West Virginia have been furnished with a brief showing comparisons between the law as provided in the Code and the existing rules in these States. Similar work is being done for Indiana. The forthcoming number of the Nebraska Bar publication will contain a similar study prepared by Lester B. Orfield of the Faculty of the University of Nebraska Law School and the Code is receiving careful attention by the Nebraska Committee. In North Carolina a careful study has been made, not only comparing the Code with present rules in North Carolina, but going through the history of criminal procedure in that State. This will be brought before the lawyer members of the legislature prior to the legislative session. A very careful study is being made in New York in cooperation with a Committee from the New York State Bar Association with a view to legislative action. In Wisconsin we are informed that the Supreme Court has under consideration a rule adopting certain portions of the Code. In Pennsylvania the Chairman of the Judicial Conference has consulted with the Reporters with a view to recommendation and there is reason to hope that the legislature will act favorably on several important sections of the Code. At the University of Texas the Code is used as a supplementary text book in the coure of Criminal Procedure."

Speaking of the progress on State Annotations of the Restatements, the report says that "a recent count showed that in twenty nine or thirty States the situation is such that we can reasonably expect annotations for the subject of Contracts to be ready for simultaneous publication with the Restatement. In no instance has there been any failure to keep the work going when once a start has been made. The difficulty, where there has been difficulty, is in getting the movement under way. In a considerable number of States voluntary contributions from the Bar have been made where local Bar Association treasuries were inadequate to supply the means. In several others the law schools have managed to relieve one of the staff from some of his teaching so that the work can be done under the auspices of the school. It ought to be added that in almost every case the Law School cooperation has been exceedingly whole-hearted.

"Efficiency of organization varies, of course, in each State. Probably the best State organizations are those of Pennsylvania, Missouri and Ohio. The first two have been particularly effective and they seem to have adequate funds to look after the work not only in Contracts, but in the other fields. In such States as these we find not only good work done by the men of the Law Schools, but active cooperation by practitioners and judges on the Committees. Such organization and operation will, of course, be encouraged in other States as the opportunity for such encouragement is presented. The program of work in connection with the local annotation project is, therefore, as follows:

"1. To keep in touch with States where the work is in progress in an endeavor to help insure its continuity and to give such suggestions as may be helpful for insuring high quality of performance. 2. To secure a start upon State Annotation work in Contracts where nothing has yet been done. 3. To encourage the local Committees to enlarge their annotation work so as to insure the production of annotations in the other subjects and to have them ready when the Restatements in those subjects appear.

"The next two are Conflict of Laws and Agency. Work in Conflict of Laws has been started in several States. Those which have done anything in Agency are very few. We have felt that this was a matter which could not be hurried because it was important to have the work in Contracts assured before asking the Committees to think about anything further."

William Draper Lewis, Director, in his report gave the Council a detailed account of the progress of the work on the Restatement since the meeting in May, 1930. Three conferences on Agency had been held, one on Business Association, one on Conflict of Laws, three on Contracts, two on Property, two on Torts and four on Trusts.

In all eighty days had been spent at these conferences, the longest time being given to Contracts, which required twenty-four days. The Director's report also contained a statement with respect to the routine financial business of the Institute.

The meeting of the Council extended over four days, during which intensive consideration was given to the following Preliminary Drafts: Business Associations No. 15, Agency No. 35, Torts No. 40, Contracts No. 51, Contracts No. 52, Trusts No. 21. The Council also considered Acts relating to the Administration of Criminal Law.

Executive Committee Holds Mid-Winter Meeting at Houston

THE Executive Committee of the Association, at its mid-winter meeting at Houston, Texas, January 13 14 and 15, fixed September 17 as the date for the next annual meeting, to be held at Atlantic City. The Conference of Commissioners on Uniform State Laws will begin its sessions on September 8. It was decided that the Executive Committee would hold its next meeting at Washington, D. C., on May 4.

At the Houston meeting the Executive Committee considered the report and recommendations of the Committee on Co-ordination of the Bar and the Committee on Law Lists. It approved the final report of the Committee on the recent referendum and the final report of the Committee on Entertainment of the British, French, Scottish and Irish Bars. It also advised the Section on Legal Education that the Committee construed the 1929 resolution of the Association regarding instruction in legal ethics in law schools as meaning separate courses in that subject.

The Committee also authorized the appointment of delegates to the forthcoming meeting of the International Academy of Comparative Law and of a committee to co-operate with the American Law Institute. The Committee on Conservation of Mineral Resources of the Mineral Law Section, the Professional Ethics Committee and the Executive Committee of the Commissioners on Uniform State Laws also held sessions. The members of the Executive Committee were entertained by the Dallas Bar on Monday and by the Houston Bar on Tuesday, Wednesday and Thursday with the most lavish hospitality.

NATIONAL CONFERENCE HELD ON UNIFORM AERONAUTIC REGULATORY LAWS

Background of the Problem Sketched by Col. Young, Assistant Secretary of Commerce for Aeronautics—Speakers Deal with Importance of Uniform Laws, Special Aeronautical Legislation Problems, Local Enforcement Problems, Legal Phases of Local Enforcement and Airports—Large Attendance

By Fred D. Fagg, Jr.
Managing Director of Air Law Institute, Northwestern University

"ONE of the most important single contributions to the rapid and safe development of aeronautics in this country is the standardization in the regulatory laws of the various states," stated Secretary of Commerce Robert P. Lamont, in his address of welcome to the delegates from nearly forty states who had met in Washington for a two-day conference, December 16-17, on uniform aeronautic regulatory laws.

Called at a most opportune time, just prior to the meeting of the various state legislatures, the purpose of the conference, as explained by Col. Clarence M. Young, Assistant Secretary of Commerce for Aeronautics, was not to pass resolutions as had been done previously[1] but to present the best thought on certain specified topics and offer these subjects for general discussion and information. The topics considered were the following: (1) Uniform basic regulatory state air law, (2) Adoption of Federal Air Traffic Rules by the states for purposes of local enforcement, (3) Methods of local enforcement, (4) State enabling acts for airport acquisition and control, and (5) Importance of uniform airport field rules.

In sketching the background of the problem, Col. Young said, in part: "There is a substantial number of aircraft being flown about the country which have not been licensed and hence their condition of airworthiness is unknown. They are being operated by unlicensed pilots with doubtful or unknown qualifications. As various states continue to strengthen their requirements, these aircraft and airmen are finding their way into other states which either have no provisions dealing with airworthiness and competency, or which have not, for one cause or another, provided adequate facilities for the enforcement of existing laws.

"Another condition worthy of consideration is the scheduled air transportation system now operating throughout the country. More than 100,000 miles are being flown every 24 hours on three transcontinental airways, two coast airways, and a multitude of inland connecting routes. Millions of dollars are invested in equipment. Millions of people are utilizing the air transport services for the transportation of mail, merchandise and themselves. Lack of uniformity in state laws affecting air transportation and aircraft operation will retard the development of this service to the nation.

"In addition to the aircraft being used in scheduled air transport services, there are approximately 6,500 privately owned licensed planes and 2,500 unlicensed planes in the United States, and more than 15,000 active pilot licenses of record. The fact there are more active pilots than planes at the present time serves to indicate the continually increasing market for aircraft and has a tendency to forecast the number of aircraft that may be engaged in non-scheduled miscellaneous operations in the near future.

"The ground phase of civil aeronautics also must be considered in discussing uniformity. There are approximately 1,800 airports and landing fields in the United States. This number is by no means sufficient to care for the present and future needs. The development of airports should not be retarded through insufficient legislation."

Importance of Uniform Laws

The importance of uniform aeronautic regulatory laws to commerce and industry, and to the aircraft industry particularly, was stressed in the addresses of Mr. William Butterworth, President, Chamber of Commerce of the United States (whose paper was presented by Mr. Irving W. Bullard) and Mr. Frederick B. Rentschler, President, Aeronautical Chamber of Commerce of America. The former paper mentioned the activities of the United States Chamber of Commerce in sponsoring the series of seven regional conferences[2] for consideration of the problems of commercial aeronautics, and presented those resolutions which had received the support of all seven of the conferences.[3] Discussing the subject from the viewpoint of the aircraft industry, Mr. Butterworth (whose paper was read in his absence) said: "We welcomed the Federal air law, and today after three years of trial we are just as strongly in favor of it as ever because it adequately cares for interstate aviation and is capable of being revised as circumstances require. But we are constantly oppressed by the fear of having our legitimate activities curtailed by improper State laws. Lack of correct information and apparent inability to visualize the future and far-reaching results have been responsible for the most outstanding instances of unsatisfactory aviation legislation.

1. For the resolutions adopted at the Legislative Air Parley of Midwest States, see 1 Jour. Air L. 207-10; for those adopted at the First National Legislative Air Conference, see 1 Jour. Air L. 577-8; for those adopted at the seven regional conferences held by the Chamber of Commerce of the United States, see the article by A. T. Stewart in 2 Jour. Air L., January, 1931.

2. These conferences were held in the fall of 1930 at Philadelphia, Boston, Chicago, Minneapolis, Atlanta, Dallas, and Portland.

3. See article by A. T. Stewart, note 1, supra.

Yet we as an industry realize that the States owe to their people every kind of safeguard tending to protect their lives and property. And we sympathize with the State authorities in this because we, more than others perhaps, know fully the nature of the complex problems involved.

"Ours is a many-sided industry. We have our runabouts and limousines of the air, our heavy trucks and fast delivery machines. You might consider them in the light of motoring. We have our fleets of big transport planes operating over many States on schedule from one terminal to another, branches, interurban lines and feeders to the main trunkline systems. You must look upon them as similar to the railroads. They function similarly and serve the same purpose of long distance transportation.

"Though the youngest of the transportation industries, we now have in this country some 38 companies operating 89 routes over 30,000 miles of airways which penetrate or traverse every State in the union except Maine. Every State has its aerial service, or air-taxi organizations. About 800 such companies are now operating from more than 1,000 airports in this country. They use nearly all the airplanes produced at present. Roughly about 8,000 machines are now being flown in the United States.

"The number of private owners, persons who fly their own machines for sport or pleasure or business, and companies or other organizations who employ aircraft in other ways except for hire, is increasing. With the perfection of both machine and flying facilities this branch of aviation must expand greatly.

"Now, your problem is ours; and at the same time we have our own problems within the industry. We strive for standardization and uniformity in equipment and operations, but we do not hope to realize that ambition until we have developed the art past its present state which in many respects still is largely experimental. We disagree among ourselves at times as to the best methods of procedure. Some of us are not so sure that the airplane as you see it today is the last word in flying vehicles. Few of us will attempt to look ahead and seriously predict more than two years in advance. But we are rather sure on some points.

"We believe that all aircraft will eventually be capable of making vastly greater speed than is common today. Special service and fast air transport machines must fly at cruising speeds of at least 200 miles an hour. The private airplane to be popular must be capable of an average speed of at least 100 miles an hour under all conditions, against headwinds and in bad weather. Those are problems for the industry to solve before aviation becomes really popular.

"And you may depend upon the industry to solve its problems. It represented at the height of its development a total public investment of about $500,000,000 and has allied to it and contributing an increasing number of inventions and improvements in the form of materials, auxiliary instruments and other apparatus, more than fifty independent industries. The science of human flight is not lagging behind the faith that the public has put into it; nor will it lag.

"We were dependent upon others for three things; increasing public confidence and patronage; government support through the contract mail system, an adequate military preparedness program and maintenance of the civil airways; and, thirdly, wisdom in legislation and regulation by the Federal, State and Municipal Governments. The States can accelerate or retard this development by their aeronautic legislation.

"They can discourage their people from becoming pilots. They can make flying a heavy financial burden and wrap enough red tape about their supervision to make all aviation more or less of a bore. Or they can simplify the whole procedure.

"The States can make laws so restrictive as to prevent profitable operations of an intrastate air service. They can put a company out of business by the manner in which they neglect to protect its operations by law. They can prevent expansion by unwise laws which lead capital to shun aeronautical enterprises. And they can render a commercial airport unprofitable by not protecting it from other laws. . . .

"The new year probably will be an 'open season' in a majority of the States where hundreds of bills await presentation. These measures cover a wide range of subjects, including the establishment, operation and maintenance of airports, licensing of aircraft and airmen, flying regulations, regulatory bodies, aviation schools, civil and criminal liability, taxation, insurance and other matters. . .

"You will find differences of opinion within the industry concerning the method by which the States should secure uniform State regulation. Many States now require either a Federal license for aircraft engaged in intrastate commercial or all intrastate operations, or else a State license issued upon the basis of the same airworthiness requirements as those imposed by the Air Commerce Regulations of the Federal Government for the issuance of a Federal license. Either of these two licensing systems results in uniformity and would seem to be in the interests of commercial air navigation. We hope that all the States will rapidly adopt one of these two systems as the solution for State regulation of aircraft engaged in intrastate navigation.

"Similarly, we hope that all State laws will require either a Federal license for pilots and other airmen engaged in intrastate operations, commercial or non-commercial, or else a State license issued on the basis of the same qualifications as those imposed by the Air Commerce Regulations for the issuance of a Federal pilot's or other airmen's license."

Senator Hiram Bingham, speaking in behalf of the National Aeronautic Association of which he is President, added that, "The National Aeronautic Association holds it to be a self-evident proposition that the best interests of all concerned are best served by uniformity of regulations. Our official platform for 1930 contains the following planks: 'We favor uniform State aeronautical legislation consistent with the Federal laws on the subject and in accordance with the recommended legislation set forth in Aeronautic's Bulletin No. 18 of the Department of Commerce,' and we favor 'suitable State legislation requiring the air marking of all incorporated cities in accordance with the standards of the U. S. Department of Commerce.' There is no more practical method of securing uniformity than by having all municipal laws and ordinances in harmony with the Federal laws and regulations.

Therefore, the National Aeronautic Association stands squarely behind the proposition that the States and cities should follow the lead of the Federal Government and take the advice of the Department of Commerce in the framing of their local legislation."

Special Aeronautical Legislation Problems

In presenting the special problems in aeronautic legislation, William P. McCracken, Jr., former Assistant Secretary of Commerce for Aeronautics, pointed out that "there are four major regulatory functions which may be invoked in relation to air commerce: (1) the licensing of aircraft and personnel, (2) air traffic rules, (3) the regulation of rates and services, and (4) regulations pertaining to the establishment and operation of airports.

"The first problem is apparently well on the way to a solution. The national government, by the Air Commerce Act of 1926, authorized the issuance of licenses for American owned aircraft found by Federal officials to be airworthy, and also the licensing of personnel found by these officials to be competent. It then required that aircraft and personnel engaged in interstate or foreign commerce as defined by that Act, must have licenses issued by the Department of Commerce. The result is that any citizen of the United States can secure a federal license for himself or for his aircraft upon compliance with the regulations promulgated by the Secretary of Commerce, but he need only do so in the event he intends to engage in interstate or foreign commerce as defined by the Act. . . .

"The States realized that a single standard was not only desirable, but was in fact so necessary that the great majority have adopted legislation requiring a Federal license in order to operate within the State. In other jurisdictions, they have provided for a State or Federal license at the option of the operator, but made the requirements for the State license identical with those of the Department of Commerce. In still other States, they require a state license, but by regulation or practice the requirements for the State license are practically the same as those for a Federal license. . . .

"Another legislative problem is presented by what are known as the air traffic rules. Obviously, in the interests of safety, which such rules are designed to promote, they must be uniform. The Air Commerce Act now provides nation-wide uniformity in the matter of air traffic rules, through the provisions making such rules applicable throughout the Nation, both in interstate and intrastate operations, whether commercial or non-commercial in character.

"In view of this situation it would seem unnecessary for the States to enact air traffic rules, although there are probably some occasions where local airport regulations may be warranted in order to meet particular situations. Not only are State air traffic rules in general unnecessary, but also there is considerable doubt as to their constitutional validity, in view of the fact that Congress has already provided for covering the field by rules of nation-wide scope.

"On the other hand, the enforcement, as distinguished from the enactment of air traffic rules, does not necessarily require the same degree of uniformity. It may well be that decentralization of the enforcement of air traffic rules through the cooperation of State officials would be more effective, and in the future when flying becomes more general, work less hardship on operators than would Federal enforcement. Authority for State officials to enforce the air traffic rules would presumably have to be obtained by Congressional legislation consenting to State enforcement. . . .

"The regulatory legislation hereinbefore presented has had to do with the safety requirements relating to aviation. There has also been some discussion of regulating the economic side of air transportation. This takes the form of requiring the operators to secure certificates of public convenience and necessity, and to conform to rates and schedules approved by governmental authority. So far the Federal government has not undertaken this type of regulation, and it is enforced in only a limited number of the several States. Inherently air transportation, unlike rail transportation, does not naturally lend itself to a monopoly; therefore, the basic reason for such regulatory legislation by the national government, or the States, is lacking. While air transportation has proven itself as a safe and reliable method of transportation, its economic principles are still in a highly experimental stage. No one can, with any marked degree of certainty, determine what are reasonable rates or how many operators are necessary to adequately serve any given territory. . . .

"The establishment and operation of airports is another element of aviation which requires encouragement, and to some degree, regulation. The Air Commerce Act under the Bingham amendment, provides for the examination and rating of air navigation facilities by the Secretary of Commerce upon request of the owners. Under this provision of the Act, the airport rating regulations have been promulgated, and are being administered, but there is nothing mandatory in the Federal law fixing the requirements for an airport, or standards for its operation and maintenance.

"Inasmuch as airports are in practically every instance wholly within the jurisdiction of one State, this might well be a subject matter for State regulaton. Nevertheless, it is highly desirable that such regulation should in a large measure be uniform, in order not only that adequate airports will be developed in all the States, but also that field rules shall be uniform."

Local Enforcement Problems

On the second day of the conference, the discussion largely centered upon questions of air law enforcement. Following two addresses dealing with the aircraft industry and enforcement, and delivered by Mr. F. G. Coburn, and Mr. Lester D. Seymour, the problem of local enforcement was considered by Clarence M. Knox, Commissioner of Aviation for the State of Connecticut.

In explaining the position of Connecticut, Mr. Knox said: "The enforcement of Uniform Air Traffic Rules, or, more generally speaking, of all aeronautical regulations, appears to be purely a policing problem, wherein the work is so organized as to cope with the mobility and speed of the vehicles to be policed. As in any other police problem, the most important fact is psychology. Just so long as there is a feeling that the police powers are inefficient or ineffective there is a certain proportion of society that will persist in violating regula-

tions and such undisciplined violation leads to others until either very concerted action must be taken to re-establish this psychological impression of the police efficiency or the regulations become totally ineffective. Moreover, in my opinion, fines as penalties for violations are most ineffective, because the average fine is no burden to an individual or organization and, unless it is a burden, has no disciplinary value. For this reason, I believe that the use of the air should be a privilege granted by the State or Federal Government rather than a personal right, in which case that privilege can be suspended or revoked at the will of the State for cause. This furnishes an effective and quick means of discipline. . . .

"Our aeronautical police organization may be divided into two main groups. First, the professional or paid police, and second, a group of unpaid civilian inspectors. The first group is again divided into three sections: (1) The technical inspectors of the Department of Aeronautics, who are thoroughly trained in the various phases of aeronautics and have full police powers; (2) the regular State police organization, and (3) the various community police organizations. The one duty common to this whole organization, which quite completely covers the entire State, is to ascertain that every aircraft flying within the State holds proper authority. If the craft are from without the State, they must hold Federal or home state licenses and registrations, unless they are to carry on intrastate commercial operations, in which case they must hold a Connecticut license and registration. This particular point is one for the exercise of reciprocity and, in case a craft's home state has control similar to Connecticut's, it would be allowed to operate by simply reporting its arrival in the State and its base of operations to the State Department of Aeronautics.

"The technical inspectors form the backbone of the police organization and it is their duty to see that the various sections are properly instructed as regards aeronautics so they will be better able to judge violations of the law and be able to use some discretion in its enforcement. This work is usually done evenings during the winter season, when flying activities are at a minimum, by means of talks at the various State Police barracks and at the police headquarters of various communities. By this means, considerable interest is aroused and a better understanding of the problem by the various police organizations is obtained. Furthermore, we make it an object to have as many police officials fly as possible, as that is the most effective means of obtaining their personal interest and wholehearted cooperation."

In explaining more fully the activities of the two groups and the various sections, Mr. Knox further stated: "In case of an accident, a technical inspector is dispatched to the scene at once, by air providing there are any landing facilities near the scene of the accident, otherwise by automobile. For this purpose the technical inspectors are subject to call twenty-four hours a day and the Department knows at all times where the men can be reached. Seldom is it more than an hour and a half, and usually less than an hour, after an accident occurs before an inspector is on the spot. In many cases, of course, the State Police are on the scene before an inspector arrives and they see that nothing is disturbed until one of the technical inspectors arrives and a thorough investigation made to determine, if possible, the causes."

Speaking for the State of Ohio, John M. Vorys, Director of the Ohio State Bureau of Aeronautics, recommended the following considerations: "The formulation of air laws is important; proper punishment for violation of these laws is important; but we must remember that our object is to secure safe air traffic, moving in accordance with uniform rules, universally understood, and that we are not dealing primarily with the enforcement of the prohibition of something. Most of the rules will provide what you must do, rather than what you must not do. We are dealing, not with a criminal class, but with a group, headed by about 15,000 of the finest people in our country, who are more anxious than any one else to make flying conditions safe. Therefore, our problem is not so much how to catch criminals, but an educational problem—how to make every one so familiar with these air rules, and so accustomed to obeying them, that they become fixed and dependable action habits in the air. . . .

"Every State should have a State department, or bureau, or division of aeronautics, and every State should rely upon existing local officials for the main work of enforcement of the air laws. Local existing enforcement agencies will be the main line of air law enforcement. Sheriffs, police, constables, state police—where they exist—will inevitably be the men who do the work of investigating violations and instituting prosecutions. Even if it were desirable to divorce all air enforcement from these local officials and to set up an entirely new force for this purpose, it would be financially and politically impossible. At present, while the total amount of flying is large, the total number of planes and pilots involved is small, the number of people financially interested are few, the possible revenue to the state is negligible, yet a separate system of policing air traffic would require a force sufficient to cover the whole state. . . .

"We do face the present problem, however, that local officials know very little about the air laws and air traffic rules, and also know very little about flying; and that in their attempts to regulate flying there is a danger, on the one hand, of unintelligent severity through suspicion of flying and flyers in general, and on the other hand, of unintelligent leniency through the feeling that the one man in town who knows how to fly is a second Lindbergh, and can do no wrong. We need immediately expert and tactful, but forceful, supervision of the air enforcement efforts of these local officials. For this reason also, if for no other, a state supervising officer is needed. . . .

"Your aeronautical official should have these functions, with reference to enforcement of air laws: (a) He should promulgate rules identical with the Federal air traffic rules, if such is the nature of your air law legislation. (b) He should explain and interpret these rules to local enforcement officials. (c) He should generally supervise enforcement. This means that he must make sure the first few violations are properly investigated and properly prosecuted. He should have authority to make arrests himself; authority to call upon local officials to act, and to call for reports of action taken; and authority to report to the Governor for

removal of local officials who fail to act. (d) He should maintain liaison with the Department of Commerce aeronautical force. (e) He should be constantly educating the public in the nature of air laws. This last function is the most intangible, the most difficult to describe, and probably the most important. It is for this reason that I recommend that your aeronautical official be directly under the Governor and be given the prestige of a place in your state cabinet, if you have one. You want a man whom people will listen to, in a position which commands attention, and then you want him to be constantly on the alert for opportunities to tell the public about the air rules which are provided for their safety."

Legal Phases of Local Enforcement

In discussing the legal phases of local enforcement of uniform air traffic rules, George B. Logan, Chairman of the American Bar Association Committee on Aeronautics, dealt with two questions: (1) the validity of the air traffic rules, and (2) the proceedings to enforce locally. After indicating the province of federal regulation, he raised the question as to whether or not Congress had entered the field of intrastate commerce by means of the air traffic rules, it being asserted that the validity of the rules would be tested, not by considering any particular rule but, instead, by considering the body of rules as a whole. "The air traffic rules of the federal government by the very terms of the Air Commerce Act are extended to apply to all air commerce and to air traffic which is non-commercial; the rules themselves specifically applying to all air traffic. The evidence of this act plus the evidence of the air traffic rules themselves seems to be conclusive of the intention of Congress to enter and appropriate this field.

"The leading case on this question is that of *Southern Railway Co.* v. *Railroad Commission of Indiana.*[4] This case involved the Federal Safety Appliance Act.

"Justice Lamar, in his opinion holding that the state prosecution under the state act could not be had, stated as follows:

> "'It is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject.
>
> "'The test, however, is not whether the state legislation is in conflict with the details of the federal law or supplements it, but whether the state has any jurisdiction of a subject over which Congress had exerted its exclusive control.'

"That this is now the law is no longer open to any argument. This same doctrine has been established in reference to cases relating to state penalities for failing to furnish cars, and to state penalties for retaining employees at work on cars beyond the time allowed by the hours of service law. Under these authorities, the state laws are void, not because they conflict, but are void even if they are by their very terms exactly the same, merely because there is valid federal legislation on the same subject. . . .

"It may be, therefore, that to obtain state aid in the enforcement of air traffic rules, the federal government will have to restrict the scope of its air traffic rules specifically to interstate commerce and not attempt to cover intrastate or non-commercial flying. This then might leave a field open for state action, the state action being based on police power and upon the regulation of intrastate air traffic only. Whether such a bargain would be worth while, whether the federal government should trade its right to regulate all flying, in exchange for state aid in enforcement, with the consequent danger that the state legislation might not be uniform, with the danger that there might be no state legislation, and with the danger that there might be inadequate state aid, is a matter for considerable study."

Under the second heading, Mr. Logan dealt with the three problems of (a) the machinery of enforcement, (b) the quantum of evidence required, and (c) the quality of evidence required, and indicated that expert testimony would have to be relied on to obtain any conviction. By way of summary, he pointed out that "as long as the promulgators of the air traffic rules can retain as fully as they have heretofore the complete confidence and respect of all air men, of operators and of pilots, there will always be available expert and skilled witnesses ready and willing to testify to secure convictions of any infractions they have observed. It will be of continuing prime importance that the air traffic rules constantly commend themselves. Rules that appeal neither to justice nor to reason, rules that are captious and capricious, will fall of their own weight in any jurisdiction, federal or state."

The Airport Problem

In an address devoted to indicating the importance of suitable airport enabling acts and uniform field rules, Mr. Richard B. Barnitz, Director of Airports, Los Angeles, maintained that, "generally speaking, airport development is, and will probably continue to be, a municipal undertaking. The Department of Commerce statement for January of the present year indicated that the number of municipal and commercial airports was nearly the same, with the latter exceeding the former by about forty in the entire United States. However, the ratio is rapidly shifting in favor of the publicly-owned and operated fields. While many small, and not a few of the larger privately owned and operated airports are being abandoned, more than a thousand cities in the United States have been constructing airports this year, anl another thousand or more are reported to be studying available sites and planning such projects. Although the commercially owned airport has had an important part in the development of civil aeronautics, and still has its functions in certain restricted activities, we see virtually no possibility of its profitable and permanent operation as a general aviation center. For one thing, there must be a pioneering period of considerable duration, just as with marine harbors, when expenditures are well in excess of revenues. This pioneering period is likely to outreach by far the length of time the private investor will be willing to wait for returns upon his capital. Private capital is not ordinarily interested in those indirect benefits, cultural and economic, which an airport can confer, and cannot be expected to foster them through any long-period program of development.

"Only through public ownership can the permanence of airport developments be definitely as-

(*Continued on Page* 130)

4. 236 U. S. 439, 59 L. Ed. 661.

STUART & LINCOLN

How Lincoln Came to Springfield to Embark on Legal Career—Forms Partnership with John Todd Stuart—Political Preoccupations of Senior Partner—"Commencement of Lincoln's Administration"—Joins the Cavalcade in Eighth Judicial Circuit —An Altercation—Value of Four Years of Association with Stuart

By William H. Townsend
Member of the Lexington, Ky., Bar

A CHILLY March wind blew across the bleak water-soaked prairie as a lank, long-legged traveler, on a borrowed horse, plodded slowly through mud and slush toward the town of Springfield, Illinois. Three law-books and a few articles of clothing stuffed into a pair of battered saddle bags, and seven dollars tucked away in his ill-fitting breeches of homespun jeans, constituted the whole of his worldly goods. Rail-splitter, flat-boatman, store-keeper, postmaster, surveyor, soldier, Legislator, Abraham Lincoln, his gaunt body slouched dejectedly over the horn of the saddle, a crisp law license bearing date of March 1, 1837, in his pocket, was embarking with sombre spirit upon a new career.

Balmy April days, however, found the fledgling lawyer's lucky star in the ascendancy. He had accepted young Joshua Speed's generous offer to share his large bed in a room over Speed's store, free of charge. William Butler, one of Springfield's most substantial citizens, who had become acquainted with Lincoln during the previous session of the Legislature at Vandalia, had insisted that he take his meals at the Butler table without thought of pay. And on April 15, 1837, the following card appeared in the local newspapers:

> "J. T. Stuart and A. Lincoln, Attorneys and Counsellors at Law, will practice conjointly in the Courts of this Judicial Circuit—Office No. 4 Hoffman's Row, upstairs, Springfield."

John Todd Stuart, a first cousin of Mary Todd, was born November 10, 1807, in Fayette County, Kentucky, seven miles east of Lexington. His father, Robert Stuart, was a Presbyterian minister and professor of Languages at Transylvania College. Receiving his academic and legal education in Kentucky, young Stuart hung out his shingle at Springfield in October, 1828.

On the morning after his arrival, Stuart stood leaning against a post in front of one of the village stores when a well-dressed old gentleman strolled up and asked him where he came from and what his business was.

"I'm from Kentucky," said the young stranger. "My profession is that of a lawyer, sir. What is the prospect here?"

The old gentleman, cocking his head on one side and squinting his left eye, pondered a moment.

"Well, young man," he replied, "there's a damned slim chance for that kind of a combination here."

The handsome, genial Stuart, however, had refused to be discouraged, and within a few years he had acquired an extensive, if not lucrative, practice, and he was the leader of the Whig politicians in Sangamon County.

When the Black Hawk war broke out, Stuart's popularity made him a major, and Captain Abraham Lincoln's Company of New Salem boys formed a part of his battalion. In 1834 the Major and the Captain were two of the nine representatives of Sangamon County in the Legislature at Vandalia, known as the "Long Nine," since every member of the delegation was over six feet in height. Stuart took a deep interest in the budding aspirations of the young rail-splitter, and after the adjournment of the Legislature Lincoln frequently walked the long distance from New Salem to Springfield to borrow law-books from the Major's library.

The new firm of Stuart & Lincoln had its office over the County Courtroom temporarily located in a two-story building on Hoffman's Row. The meager equipment consisted of a rude pine table, several rickety chairs, a dilapidated sofa covered with a moth-eaten buffalo robe, a bench, much scarred by jack-knives, and an old wood stove. Five volumes of the Illinois Reports and about twenty volumes of miscellaneous law books, legislative reports and congressional documents were stacked on rough board shelves nailed to the drab, unpapered walls.

The senior partner was much absorbed in his race for Congress against the doughty Stephen A. Douglas, and the drudgery of the law office, such as it was, fell on Lincoln. Most of the firm's pleadings during this period, together with the entries in the old account book, are in the small, uniform and very legible handwriting of the junior partner.

"Commencement of Lincoln's Administration," he jocularly wrote at the top of one of the ledger pages, a few items from which will serve to illustrade the nature and extent of the firm's practice:

"E. C. Ross	
to Stuart & Lincoln	Dr.
1837—April—To attendance at trial of J. F. Davis property before Moffatt	5.00
Mather, Lamb & Co.	
to Stuart & Lincoln	Dr.
1837—April—to attendance at trial of J. F. Davis property before Moffatt	5.00

Lucinda Mason	
to Stuart & Lincoln	Dr.
1837—October—to obtaining	
an assignment of dower	5.00
Wiley & Wood	
to Stuart & Lincoln	Dr.
To defense of Chancery case	
of Ely	50.00
Credit by coat to Stuart	15.00"

In the office record of expenses, he noted that "Lincoln paid for wood $0.50," and "Lincoln paid for saw $2.25."

"I am quite as lonesome here as I ever was anywhere in my life," wrote Lincoln to the portly Mary Owens, of Greene County, Kentucky, whom he had met at the home of her sister near New Salem. Having proposed marriage, and thinking himself accepted, he was very much dejected and gloomily reported: "There is a great deal of flourishing about in carriages here which it would be your doom to see without sharing. You would have to be poor, without the means of hiding your poverty." Still: "What I have said I will most positively abide by, provided you wish it. My opinion is that you had better not do it."

The first client of the new firm seems to have been one David Woolridge, whose former tenant, James P. Hawthorn, had sued him in three separate actions growing out of Woolridge's alleged failure to furnish plaintiff "twenty acres of prairie ('Prairy,' as Lincoln spelled it) sod ground"—and two yoke of oxen with which to do the plowing. Hawthorn alleged that in a recent altercation over the matters in dispute the defendant had "struck, beat, bruised and knocked him down; plucked, pulled and tore large quantities of hair from his head, and, with great violence, forced, pushed, thrust and gouged his fingers in plaintiff's eyes."

Lincoln filed an answer denying the allegations of trespass, and put his client "upon the country," but, after several months of dilatory skirmishing, the litigation was compromised out of court, with an equal division of costs.

So far as I have been able to discover, the case of Nancy Green v. Aaron Green, filed in the Sangamon Circuit Court, September 4, 1837, was Lincoln's first divorce suit, and he obtained a judgment for the plaintiff on the ground of abandonment. Later, he represented Samuel Rogers in an action for divorce against his wife, Polly Rogers. The husband informed his attorney that the erring Polly had been guilty of adultery with one William Short, but Lincoln, according to the record, "for no other cause than through tenderness for defendant's character," advised him "not to make the charge in his bill, as there was another sufficient ground upon which to obtain a divorce, to-wit, absence for more than two years."

Over in Tazewell County David Bailey was sued on a note which he had executed to Nathan Cromwell. Bailey employed Stuart & Lincoln to represent him, and the junior partner filed an answer alleging that the note was given for the purchase of a negro girl; that "before judgment was to be demanded Cromwell was to produce the necessary papers and indenture to show and prove that said girl was a slave or servant and bound to servitude under the laws of this state"; that Cromwell had failed to do this, and that, since the laws of Illinois presumed every person free, regardless of color, the note was without consideration.

The lower court decided against the defendant, but upon appeal the Supreme Court of Illinois (3 Scammon 71) sustained Lincoln's contention, and directed that a judgment be entered in favor of Bailey.

In December, 1839, Stuart, having defeated Douglas, went to Congress, and Lincoln began to attend the courts of other counties in the Eighth Judicial District. Harvey Ross, the mail carrier, describes him as he met him one cold, rainy day on the road between Canton and Lewistown. He had a large portmanteau on his saddle filled with law books and clothing, was dressed in a suit of Kentucky jeans with a heavy overcoat having four capes, standing collar, and fastened with a hook and clasp, and he wore a pair of green baize leggings wrapped three times around the leg and tied just below the knee.

Footloose and carefree once more, now that Mary Owens had terminated the desultory courtship by the declaration that he was "deficient in those little links that go to make up the chain of a woman's happiness," the easy-going Lincoln was immensely intrigued by the picturesque, nomadic life of the circuit. The cavalcade of lawyers galloping across the prairies between the county-seats—long evenings of song, story and jest by the tavern fire—rough and tumble conflict before back-woods juries—the pungent, frequently coarse, and oftentimes unconscious humor of the court room were treasured memories that Lincoln, even in the midst of the stress and strain of after years, never forgot.

A defendent was on trial for mistreating a livery horse. One of the witnesses testified: "When his company rides fast he rides fast, and when his company rides slow he rides slow."

"What I want to know is," demanded the impatient and somewhat pompous attorney for the State, "how he rides when he is alone."

"W-e-l-l," replied the witness haltingly, as he gravely pondered the question, "I-never-was-with-him-when-he-was-alone; so—I don't know."

Every lawyer was a politician, and none more so than the judges who presided over these primitive tribunals. The case of People v. Green was a typical example of the unwillingness of the judiciary to assume unnecessary responsibility. The defendant had been found guilty of murder and the learned judge was obliged to pronounce sentence.

"Mr. Green," he began earnestly, "the jury in their verdict say you are guilty of murder, and the law says you are to hang. Now, I want you and all your friends down on Indian Creek to know that it is not I who condemns you, but it is the jury and the law. Mr. Green, the law gives you an interval for preparation, so the court wants to know what time you would like to be hung?"

The prisoner "allowed" it made no difference to him, but his Honor was disturbed by such nonchalance.

"Mr. Green, you must know it is a serious matter to be hung," he admonished uneasily, "you had better take all the time you can get. The court will give you until this day four weeks," he added with an ingratiating smile.

Hoffman's Row, Springfield, Ill. The Law Office of Stuart & Lincoln was in the upper story of the third building from the left, occupied at the time photograph was taken by Tom Dupleaux' furniture store

The prisoner made no response, but Prosecutor Turney arose and addressed the bench.

"May it please the Court," he began impressively, "on solemn occasions like the present it is usual for the court to pronounce formal sentence in which the leading features of the crime shall be brought to the recollection of the prisoner and a sense of guilt impressed on his conscience and in which he shall be duly exhorted to repentance and warned against the judgment in the world to come."

"Oh, Mr. Turney," the judge interrupted testily, "Mr. Green understands the whole matter as well as if I had preached to him a month. He knows he has got to be hung this day four weeks. You understand it that way, Mr. Green, don't you?" he appealed to the prisoner.

"Mr." Green nodded and the court then adjourned.

In one of his first murder cases, Lincoln defended William Fraime, who was convicted on April 25, 1839, in Hancock County, and twenty-three days later, obedient to the judgment of the court, he was "hung by the neck until dead."

The heat of bitter legal controversy frequently led litigants, and occasionally lawyers, into personal encounters. Lincoln, with his enormous physical strength, genial nature, and unquestioned courage, often played the role of peace-maker, and was never quick to take offense. He was not always, however, able to control his temper, but he never failed to be ashamed of the fact that he had lost it.

One day Lincoln and W. G. Anderson became involved in a wordy altercation, and on the following day, having received a letter of severe criticism from his late adversary, Lincoln replied as follows:

"Laurenceville, October 31, 1840.

W. G. Anderson,

Dear Sir:

Your note of yesterday is received. In this difficulty between us of which you speak, you say you think I was the aggressor. I do not think I was. You say my "words imported insult." I meant them as a fair set-off to your own statements, and not otherwise; and in that light alone I now wish you to understand them. You ask for my present "feelings on the subject." I entertain no unkind feelings to you, and none of any sort upon the subject except a sincere regret that I permitted myself to get into such an altercation.

"Yours, etc.,

"A. Lincoln."

Throughout Stuart's term in Congress, the junior partner wrote him long, chatty letters about business and politics. The Whigs could carry the state for Harrison. Even Japh Bell had come out for him. "Ain't that a caution?" Douglas had considered himself insulted by something that had appeared in the Journal. He had undertaken to cane Editor Francis in the street, but Francis had "caught him by the hair and jammed him back against a market cart. . . . Everybody thought the whole affair very ludicrous."

"A damned hawk-billed Yankee," wrote Lincoln, "is here besetting me at every turn I take, saying that Robert Kenzie never received the eighty dollars to which he was entitled. Can you tell anything about the matter?"

And again: "Old Mr. Wright, who lives up on South Fork somewhere, is teasing me continually about some debts which he says he left with you, but which I can find nothing of."

The closing months of the Stuart & Lincoln partnership found Lincoln deeply despondent over his broken engagement with Stuart's cousin, Marv Todd.

"For not giving you a general summary of news you must pardon me," he wrote to the Congressman on January 23, 1841. "It is not in my power to do so. I am now the most miserable man living. If what I feel were equally distributed to the whole human family there would not be one cheerful face on the earth. Whether I shall ever be better, I cannot tell. I awfully forebode I shall not. To remain as I am is impossible; I must die or be better it appears to me."

The four years of apprenticeship with Stuart had been of inestimable value to Lincoln. The ground-work of his future success, both in politics and the law, had been well laid. Serving his fourth term in the Legislature, he was now the Whig floor-leader, regarded as one of the ablest young politicians in the central part of the state. His law practice had been more varied than remunerative,

*This is the first of a series of articles written by Mr. Townsend especially for the AMERICAN BAR ASSOCIATION JOURNAL on the law partnerships of Abraham Lincoln.

but he had established a wide acquaintance and his reputation for integrity and fair dealing would stand him in good stead through the years to come. He was still rather slipshod and superficial in the preparation of his cases, and methodical attention to detail never became one of his characteristics, but in his second partnership we shall see Lincoln profit greatly by association with one of the most profound, thorough and painstaking lawyers of the Illinois Bar.

THE PROPOSED UNIFORM CHILD LABOR ACT

Measure Represents an Effort to Cope with Problem in as Careful and Scientific a Manner as Possible and to Overcome Difficulties Which Have Heretofore Stood in the Path of Uniformity—Children Engaged in Agriculture, Domestic Service and Athletic Games Excluded from Its Operation—Further Details

By Bruce W. Sanborn

Chairman, Committee on Uniform Child Labor Act of Conference of Commissioners on Uniform State Laws

THE approach to the child labor problem in the United States, in view of the fate of the Federal Child Labor Amendment, has continued to be through legislative action by the States. A proposed Uniform Child Labor Law, approved by the American Bar Association in Boston in 1911, served as a standard for the drafting of a number of State child labor laws, but was never adopted in its entirety by any of the States. For a number of years organizations and individuals who had opposed the Federal Child Labor Amendment on the ground that the subject of child labor was a matter for State action, have been knocking at the door of the National Conference of Commissioners on Uniform State Laws for a law which could be adopted uniformly throughout the country. The National Conference has been endeavoring to frame such a law since 1925, and at its meeting at Memphis in 1929, tentatively approved an Act which had been before it each year beginning with the year 1925, and had been the subject of much discussion and controversy within the Conference. That Act, which has aimed to embody in it the thought of the present day on the subject, and to have requirements which would tend to make evasion of the law difficult, was finally approved by the National Conference at its 1930 meeting in Chicago,and later received the approval of the American Bar Association.

Since then considerable public attention has been focused upon the Act. It has been recognized that the child labor laws which have been in existence in the different States contain within them provisions at variance with one another, a condition which arises in part from unusual conditions which exist in different parts of the country, and in part from the wide diversity of opinion which exists upon the general subject.

The present Act excludes from its operation children engaged in agriculture, domestic service and athletic games. The cotton picker, the nurse and the caddy do not come within its purview. One thought with regard to them has been that to include such employments would be to destroy the possibility of uniformity; another that the employments excluded are by their nature healthful, and of such a character as not to demand the same regulation as work done in confined quarters, or in hazardous occupations. It has been suggested, for instance, that work done in the cotton fields of the South is not in itself harmful, but in fact beneficial to the child; not to mention its importance from the standpoint of the gathering of that crop.

A primary source of controversy in child labor circles is the minimum age at which a child should be permitted to labor. One group has opposed any limit whatsoever, and clings to the view that the tendency of work is to benefit the child, teach it habits of industry, sharpen its faculties and strengthen its character. Another group believes that the minimum age requirement should be at least 18 years of age. In the legislation which has been enacted in the States which have child labor laws, the minimum age has varied, but the general tendency has been to fix the age at 14 years. At the White House Conference on Child Health and Protection, held in November, 1930, a recommendation put forward by the Child Labor Section of the Committee on Vocational Guidance and Child Labor was that the minimum age should be 16, except that employment outside of school hours might be permitted between the ages of 14 and 16 in a restricted list of occupations. In the proposed Uniform Child Labor Act approved by the National Conference of Commissioners on Uniform State Laws the minimum age for employment in any gainful occupation is fixed at 14 years, except that there is a special provision pertaining to street trades. That provision is that boys between 9 and 16 years of age may distribute or sell newspapers or magazines, but that boys under 16 shall not work in other street trades unless they comply with the requirements of school attendance, and unless they secure a certain permit and a badge, and wear the badge in plain sight while so working. The minimum age thus fixed corresponds with the legisla-

tion already in effect in many of the States, and does not differ widely from the law in many European countries.

In the proposed Uniform Act certain regulations as to hours of work and night work apply to all children under the age of 18 years. It is provided that children between the ages of 14 and 18 years shall not be employed more than eight hours in any one day, nor more than forty-eight hours in any one week, nor more than six days in any one week, nor before seven o'clock in the morning, nor after six o'clock in the evening; that every such child shall be entitled to not less than thirty consecutive minutes for meal time within five hours from the time of beginning work, which period shall not be included as a part of the work hours. The Act provides that no such minor shall be engaged in both school and employment for more than ten hours in any one day.

There is in the Act what is known as the permit provision. It provides that no person between the ages of 14 and 18 years shall be "employed, permitted or suffered" to work except in street trades, unless the employer procures and keeps on file in the establishment or in the residence in or about which such minor is at work a permit issued according to the provisions of the Act. These permits are to be issued by a person known as the issuing officer, appointed by a State Board for enforcement of the Act. The permit shall bear the minor's name, sex, color, and birth place, his signature, the name and address of his employer, and the specific employment in which he is authorized to be engaged, and other information.

In order to obtain a permit, the minor, accompanied by his parent, guardian or custodian, must present himself in person, sign the application, have it approved and filed, and accompanied by certain documents which are referred to as (1) evidence of age, (2) evidence of schooling, (3) evidence of physical fitness, and (4) evidence of prospective employment. If the evidence of prospective employment is not presented within two months after the issuance of the certificate of physical fitness, the issuing officer shall not issue a permit until the minor has been re-examined by the physician and has obtained a new certificate of physical fitness.

It has been found that much deception has in the past been practiced in the matter of age, and the Act requires evidence as to age of a searching nature.

In general, the evidence of schooling, in case the minor is to be employed at such times as would prevent his regular school attendance, is a school record showing his completion of the eighth grade or its equivalent. That requirement may be waived in case of work during a regular school vacation; and if the minor is to be employed during the regular school term but only at such hours as would not prevent his regular school attendance, the school record need only show that in the opinion of the school's chief executive officer he is physically or mentally qualified to undertake such work in addition to the regular school work.

The evidence of physical fitness required by the Act is a certificate of physical fitness signed by a public health, public school, or other public physician, appointed by the issuing officer with the approval of the State Board. It shall supply certain detailed information and vouch for the minor's complete physical ability to engage in any legal occupation, or his ability to so engage under certain limitations.

The evidence of prospective employment is to consist of a statement signed by the prospective employer or his authorized agent promising to give present legal employment, and setting forth the specific character of the proposed work and other details.

Certain minimum ages are specified in the Act for work in numerous occupations which are more or less hazardous. The minimum age for work in mines or quarries is fixed at 18 years. There is an enumeration of dangerous occupations in which children under 16, 18 and 21 may not be employed.

It is recognized that the Act is likely to meet with the criticisms which are leveled at so-called social legislation. There is a problem to be solved, and the Act represents an effort to cope with it in as careful and scientific a manner as possible; and to overcome difficulties which have heretofore stood in the path of uniformity.

Appointment of Notaries Public

EDITOR AMERICAN BAR ASSOCIATON JOURNAL:

In my letter to you published in the May, 1930, issue of the American Bar Association Journal, page 338, I suggested that only members of the Bar in the various states be appointed Notaries Public. This suggestion grew out of experience in the examination of titles to real estate wherein gross carelessness of the Notary Public has put the client to great unnecessary expense. In suggesting that the American Bar Association could render a very real service by supporting the idea that only members of the Bar be hereafter appointed to the office of Notary Public. I had in mind the prevention of errors in the land records of the various jurisdictions more than anything else.

The very interesting letter of Mr. Benjamin Tuska of New York published in the August issue of the Journal at page 502 makes the suggestion that the office of Notary Public be abolished and a "Commissioner for Oaths" be created in its stead. I hardly think this is necessary, the vice in the situation lying merely in the character of persons now appointed as Notaries.

It is interesting to note that in the District of Columbia the Department of Justice has instituted a new plan for the appointment of Notaries Public. Under this plan every person applying for a Commission as a Notary Public must appear in person on a day and at an hour designated at the Department of Justice and take an examination on the general duties and powers of a Notary under the law. This has already resulted in rejecting a great number of incompetent applicants and in preventing the reappointment of a number of ignoramuses who have heretofore held Commissions as Notaries Public.

Every conveyancer and title examiner will fully realize that a great saving in money now wasted in equity suits to correct flaws in titles can be effected by raising the qualifications of persons appointed as Notaries Public.

FREDERICK S. TYLER.

Washington, November 25, 1930.

Binder for Journal

STATE REGULATION OF MOTOR VEHICLES OPERATING IN INTERSTATE COMMERCE

Consideration of Decisions Illustrating the Extent to Which State May Go in Making Rules for Protection of the Persons and Property of Its Citizens and the Preservation of Its Public Highways Even Though Interstate Commerce Is Affected—Existing State Legislation Superseded by Congressional Exercise of Power in This Field, etc.

By Mac Asbill
Member of the Atlanta, Ga., Bar

THERE has been a tremendous increase in the use of motor vehicles since 1920. Already many states have enacted laws to regulate the business of transporting persons and property by motor vehicles on their public highways. It is quite evident that an increased tonnage of interstate transportation by motor vehicles will move over a connected system of paved highways as more highways are paved in the various states. In the future the states will be interested, even more than at present, in such regulation of these vehicles as will promote the public safety and order and preserve the paved highways built at the expense of the states.

The right of the states to regulate motor vehicles is drawn from two sources, to-wit: The nature of the business done, and the use of the public highways. Because of the public interest, the common carriage of passengers or freight by motor vehicles is subject to regulation although the owners exercise no special franchise and use only their own property. In Georgia and other states the highways built and maintained by the public are public property and (subject to such interest as the United States may have in them as post roads) are subject to state control. The question to be considered is how far may the states go in regulating such vehicles.

In the course of this discussion reference will be made to decisions of the Supreme Court of the United States wherein have been discussed specific questions arising out of the regulation of motor vehicles or where principles have been announced that illustrate the type of regulation that a state may exert in relation to interstate commerce. States, of course, may not regulate interstate commerce directly, but there is a field for state regulation which affects interstate commerce and which may be exercised by the states until the Congress has occupied the field. At this time Congress has enacted no law to regulate interstate motor transportation, although the Parker Bus bill is pending in Congress, and there is no Federal regulation of any kind exercised over the operation of motor buses and motor trucks engaged in interstate commerce when they are not used in terminal services in connection with rail transportation.

The Motor Carrier Act of 1929 enacted by the Legislature of Georgia and the rules prescribed by the Georgia Commission as authorized thereunder are believed to be representative of the various state laws and rules upon the subject of motor vehicles. Hereinafter, occasional reference will be made to the Georgia law and to certain rules of the Georgia Commission merely as illustrative. Space will not permit of a technical discussion of all the constitutional aspects of these rules.

Examination of Drivers and Requirement of License

In Jos. J. Smith v. State of Alabama, 124 U. S. 463, 31 L.Ed. 508, the court upheld a conviction under a statute of Alabama making it unlawful for an engineer to operate a train upon the main line of any railroad in the state used for the transportation of persons or freight without first undergoing an examination and obtaining a license. Smith was arrested for operating an engine without a license, the train being a passenger train operated in interstate commerce.

The provisions of the Alabama statute considered by the Supreme Court were not regulations of interstate commerce. They were parts of that body of the local law which properly governs the relation between carriers of passengers and merchandise and the public who employ them, and are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce.

The rules of the Georgia Public Service Commission do not provide for the examination or license of drivers of motor vehicles but do regulate the drivers.[1]

None of the rules of the Georgia Commission has been attacked in court proceedings. Rule 27 prohibits the use of intoxicating liquors or narcotics by the driver "on or off duty." In the Smith v. Alabama Case the statute of Alabama provided for the forfeiture of his license if an engineer was

1. "Rule 27. The drivers of motor vehicles shall not drink intoxicating liquors or use narcotics on or off duty. . . ."
"Rule 66. Drivers of motor vehicles shall be American citizens, not less than twenty-one years of age, of good moral character and shall be fully competent to operate the vehicle under their charge."
"Rule 67. In the interest of safety the drivers of motor vehicles carrying passengers shall refrain from smoking during the time the vehicle is in motion."
"Rule 68. Drivers and operators of motor vehicles carrying passengers shall not carry on unnecessary conversation with passengers while the vehicle is in motion."
"Rule 71. In the interest of public safety, no driver or operator of a motor vehicle carrying passengers or freight shall be permitted to operate said vehicle for more than 10 consecutive hours and shall have at least 10 consecutive hours rest out of each 24 hours, and the driver shall not be able to take his rest on the motor vehicle while in operation."

in a state of intoxication six hours before or during the time that he was engaged in running an engine. In view of our present acquiescence in the regulation of personal conduct, as reflected by the prohibition laws, Rule 27 is believed to be valid. With respect to the requirement of Rule 66 that drivers shall be "American citizens" the reader might consider the language of Justice Hughes, now Chief Justice Hughes, in the case of Barrett v. State of New York, 232 U. S. 14, at 33-4, 58 L.Ed. 483, at 491-2. The writer is of the opinion that such a requirement is unnecessarily burdensome since it does not depend upon the driver's ability to meet any appropriate tests as to his qualifications. Moreover, this requirement is believed to violate the equal protection clause of the Fourteenth Amendment, under the principle announced in Truax v. Raich, 239 U. S. 33, 60 L.Ed. 131, and not to come within the principles announced in such cases as Heina v. McCall, 239 U. S. 175, 60 L.Ed. 206; Crane v. New York, 239 U. S. 195, 60 L.Ed. 218; Terrace v. Thompson, 263 U. S. 197, 68 L.Ed. 255; Porterfield v. Webb, 263 U. S. 225, 68 L.Ed. 278; Webb v. O'Brien, 263 U. S. 313, 68 L.Ed. 318, and Frick v. Webb, 263 U. S. 326, 68 L.Ed. 323.

Rule 71 is valid under the principle announced in Baltimore & Ohio Railroad Company v. Interstate Commerce Commission, 221 U. S. 612, 55 L.Ed. 878.

Physical Fitness of Driver

In Nashville, Chattanooga & St. Louis Railroad Company v. State of Georgia, 128 U. S. 26, 32 L.Ed. 362, the Supreme Court upheld a statute of Alabama disqualifying all persons afflicted with color blindness and loss of visual power to the extent therein defined from serving on railroad lines within the state in the capacity of locomotive engineer, fireman, train conductor, etc.

Rule 68 of the Georgia Commission requires that drivers of motor vehicles "shall be fully competent to operate the vehicle under their charge." Neither the Motor Carrier Act of 1929 nor the rules of the Georgia Commission make any provisions for the ascertainment of the competency of such drivers, although the Act makes the violation of any rule of the Commission a misdemeanor. Such a requirement is too uncertain and indefinite in its terms to be capable of enforcement in a criminal proceeding. Hayes v. State, 11 Ga. App. 371 (2). Such language might not be too indefinite to furnish a rule of civil conduct. Strickland v. Whatley, 142 Ga. 802.

Equipment of Vehicles

In New York, New Haven & Hartford Railroad Company v. State of New York, 165 U. S. 628, 41 L. Ed. 853, the Supreme Court held that cars employed in interstate commerce were not exempt, in the absence of national legislation covering the subject, from the operation of a statute of New York forbidding under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom. Counsel for the railroad contended that a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce might make safe and rapid transportation impossible. The court said that such possible inconvenience could not affect the question of power in each state to make such reasonable regulation for the safety of passengers on interstate trains as in its judgment, all things considered, was appropriate and effective.

In Atlantic Coast Line Railroad Company v. State of Georgia, 234 U. S. 280, 58 L. Ed. 1312, the court upheld the validity of a statute of Georgia requiring railroad locomotives running on the main line to be equipped with electric headlights, which should consume not less than 300 watts at the arc, with reflectors not less than 23 inches in diameter. The decision recognized that the use of locomotive headlights was directly related to safety in operation. The Court said:

> "It cannot be said that the legislature acted arbitrarily in prescribing electric light, in preference to others, or that, having made this selection, it was not entitled to impose minimum requirements to be observed in the use of the light."

The railroad contended that the statute of Georgia constituted an unwarrantable interference with interstate commerce since the locomotive with respect to which the accusation was made was at the time being regularly used in the hauling of interstate freight trains over the company's main line of railroad, and was equipped with an oil headlight. Answering this contention, the Supreme Court said that the statute as interpreted by the Supreme Court of Georgia was not directed against interstate commerce, but only incidentally applied to locomotives used in hauling interstate trains while these were moving on the main line in the State of Georgia.

In Napier v. Atlantic Coast Line Railroad Company, 272 U. S. 605, 71 L. Ed. 432, the court was called upon to consider whether the Boiler Inspection Act of Congress had occupied the field of regulating locomotive equipment used on all railways in interstate commerce, so as to preclude state legislation. A statute of Georgia required that every locomotive engine should be equipped with an automatic door to the fire-box and prescribed the method of construction and operation of the door.

Before the Georgia statute was enacted Congress had amended section 2 of the original Boiler Inspection Act to read as follows:

> "That it shall be unlawful for any carrier to use or permit to be used on its lines any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The Interstate Commerce Commission had made no order requiring either a particular type of fire-box or door; nor had Congress legislated specifically in respect to either device. The Supreme Court held that the legislation of Congress manifested its intention to occupy the entire field of regulating locomotive equipment and affirmed the action of the lower court in enjoining the enforcement of the Georgia statute.

Such regulations as come within the principles announced in the decisions cited may be imposed by the states upon motor vehicle transportation. At this time no regulation by the state could be in conflict with any Federal statute upon the subject, because Congress has enacted no law to regulate motor vehicle transportation in interstate commerce. The Georgia Public Service Commission

has issued rules covering the equipment and operation of motor carriers. Illustrative of these are the rules relating to water-proof covering as part of equipment for open vehicles, specifications for front and rear lights, requirement of pneumatic tires, provision for heating systems in passenger vehicles, specifications as to brakes, steering equipment and signalling devices, etc., all of which are believed to be valid.

Operation of Vehicles

In the case of Smith v. State of Alabama, supra, the Supreme Court said that state laws regulating the operations of trains so as to protect persons and property were valid.

In Hemington v. State of Georgia, 163 U. S. 299, 41 L. Ed. 166, the Supreme Court upheld the constitutionality of a statute of Georgia making it unlawful to run any freight train on Sunday.

In Lakeshore & Michigan Southern Railway Company v. State of Ohio, 173 U. S. 285, 43 L. Ed. 702, the Supreme Court held that an Ohio statute requiring each railroad company whose road was operated within the state to cause three each way of its regular trains, carrying passengers, if so many were run daily, Sundays excepted, to stop at a station, town or village containing over 3,000 inhabitants, long enough to receive and let off passengers, was for the public convenience, and was not under the facts before the Court a regulation of interstate commerce and unconstitutional when applied to the trains of a corporation of the state engaged in such commerce.

In Morris v. Duby, 274 U. S. 135, 71 L. Ed. 966, the Supreme Court upheld a regulation of the Highway Commission of Oregon reducing the weight of loaded trucks permitted on the highways of the state. Under prior regulations motor carriers were allowed to carry a combined maximum load of not exceeding 22,000 pounds. The Highway Commission under a law of Oregon reduced the maximum to 16,500 pounds by an order in which the Commission recited that the road was being damaged by heavier loads.

These decisions show clearly that the right of a State to protect the public safety and property under its police power, when the statute is not itself unreasonable, unquestionably exists, and even though such regulation may indirectly affect interstate commerce it is not unlawful so long as the Congress fails to legislate on the same subject.

The Georgia Public Service Commission has prescribed rules to govern the operation of motor vehicles which regulate their speed at intersecting highways, upon curves and bridges, when passing schools during certain hours, and in other respects covered by Rules 60, 61, 62 and 63. Rule 70 prohibits the loading of a freight motor vehicle in excess of fifty per cent above the manufacturer's rated carrying capacity of the vehicle.

The general scope of the speed rules seems to be within the power of the states. Rule 70 may be subject to attack on the ground that it is indefinite and sets up a fictitious and unreasonable standard.

Registration of Vehicle and Collection of Registration Fee

Many of the motor vehicles operated in the various states are owned by non-resident individuals or by corporations of other states. The power of a state to regulate the use of its highways extends to their use by non-residents as well as by residents. In Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385, the Supreme Court upheld the conviction of a non-resident temporarily in Maryland under an Act of the Maryland legislature which prohibited the operation of any motor vehicle upon the highways until the owner had procured a certificate of registration and paid a registration fee. In its opinion the court said:

> "In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines,—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety, and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress."

Appointment of State Official as Agent for Service of Process

In advance of the operation of a motor vehicle on its highways by a non-resident a state may require him to appoint one of its officers as his agent on whom process may be served in proceedings growing out of such use within the state. The case of Kane v. State of New Jersey, 242 U. S. 160, 61 L. Ed. 222 recognizes the power of a state to exclude a non-resident until the formal appointment is made.

In its decision in the Kane Case the Supreme Court cited the prior case of Hendrick v. Maryland, supra, which considered a Maryland statute. The Maryland statute differed from the New Jersey statute in that the Maryland law did not require the non-resident to appoint an agent within the state upon whom process might be served; the Maryland law contained a reciprocal provision by which non-residents whose cars were duly registered in their home state were given for a limited period free use of the highways in return for similar privileges granted to residents of Maryland while the New Jersey statute contained no such provision. In the Hendrick v. Maryland case it appeared only that the non-resident drove his automobile into the state, while in the Kane case the undisputed facts showed that he was driving through the state. In the Hendrick case it did not appear, as in the Kane case, that the fees collected under the motor vehicle law exceeded the amount required to defray the expense of maintaining the regulation and inspection department. These differences the Supreme Court held to be immaterial.

Use of Highways as Equivalent to Appointment of Agent for Service of Process

Having the power to exclude a non-resident until the formal appointment of an agent for service is made, a state may declare that the use of its highway by a non-resident is the equivalent of the appointment of the registrar of the state as agent on whom process may be served in proceedings growing out of the use of an automobile within the state. In Hess v. Pawloski, 274 U. S. 352, 71 L. Ed. 1091, the question before the court was whether a

Massachusetts enactment contravened the Due Process Clause of the Fourteenth Amendment. After referring to such cases as Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, the court said:

"Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents, but tends to put them on the same footing as residents. Literal and precise equality in respect to this matter is not attainable; it is not required."

It affirmed the judgment of the lower court awarding damages against the non-resident.

Requirement of License by State

In the absence of national legislation covering the subject, the states may impose upon vehicles using their highways exclusively in interstate commerce non-discriminatory regulations for the purpose of insuring the public safety and convenience, such as a license fee no larger in amount than is reasonably required to defray the expenses of administering the regulations. This power the state may delegate to a municipality. Such a license fee imposed on an interstate carrier by bus cannot be sustained as a police measure if it is not imposed as an incident of an inspection scheme, and if it does not appear that the proceeds are applied to defraying the expenses of such regulation, or that the amount collected is no more than is reasonably required for the purpose.

In Sprout v. City of South Bend, 277 U. S. 163, 72 L. Ed. 833, the City prohibited by ordinance the operation in its streets of any motor bus for hire unless licensed by the city. Sprout operated regularly a motor bus between the points of South Bend, Indiana, and the city of Niles, Michigan. He paid the State Registration fee, but refused to apply for a city license and was prosecuted and fined. The ordinance prescribed license fees varying with the seating capacity of the bus, that for a bus with seats for twelve persons being $50.00 a year. The Supreme Court of the United States reversed the conviction and said:

"But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee cannot be sustained as a police measure."

This decision recognized the previously established principle that a state may impose on motor vehicles engaged exclusively in interstate commerce a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways and that an exaction for that purpose may be included in a license fee, but said in connection with the particular license fee before the Court:

"But no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."

License as Condition Precedent to Transacting Interstate Business

In Barrett v. City of New York, 232 U. S. 14, 58 L. Ed. 483, the Court declared unconstitutional ordinances of the Board of Aldermen of the City of New York which were construed by the City to require the Adams Express Company to obtain a local license as a condition precedent to transacting within the City its interstate business. The Supreme Court said:

"Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license."

In New Jersey Bell Telephone Company v. State Board of Taxes and Assessment of the State of New Jersey, 280 U. S. 338, 74 L. Ed. 463, the Supreme Court said:

"But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce a state may not . . . impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

Requirement of Certificate of Public Convenience and Necessity as a Prerequisite to Use of Highways in Interstate Commerce

A state cannot prohibit the use on an interstate highway of auto vehicles by common carriers for hire, over regular routes, unless a certificate is secured from a public official of the State declaring that public convenience and necessity require such operation.

In Buck v. Kuykendall, 267 U. S. 307, 69 L. Ed. 623, the court considered Section 4 of the laws of Washington, 1921. That section prohibited common carriers for hire from using the highway by auto vehicles between fixed termini or over regular routes without having first obtained from the Director of Public Works a certificate declaring that public convenience and necessity required such operation. Buck wished to operate an auto stage line between Seattle, Washington, and Portland, Oregon, as a common carrier for hire, exclusively for through interstate passengers and express. He applied to the State of Washington for the prescribed certificate of public convenience and necessity and same was refused on the ground that the territory was already being adequately served by the holder of a certificate. The bill was brought to enjoin interference by state officials with the operation of the projected line. The Supreme Court held that Buck was entitled to an injunction. The Court, in speaking of the requirement of Section 4 of the Washington Act said:

"Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. . . . Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of Federal action,—the existence of adequate facilities for conducting interstate commerce. . . . Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon

such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause."

A State Has no Power to Forbid Use of Highway to Prevent Prejudice to Existing Lines of Transportation

A state cannot forbid the use on its highways of motor vehicles operated by common carriers for hire, over regular routes, in interstate commerce, merely because existing lines of transportation would be prejudiced thereby.

In Bush & Son Company v. Maloy, 267 U. S. 317, 69 L. Ed. 627, the Public Service Commission of Maryland refused a permit to Bush & Son Company to do an exclusively interstate business as a common carrier of freight over specified routes. In refusing the permit, the Commission considered merely whether or not existing lines of transportation would be benefited or prejudiced, and in this way the public interest affected. The Supreme Court held that Bush & Son Company was entitled to an injunction enjoining interference with the use of its vehicles on the public highways. In its decision the Court relies upon its prior decision in the case of Buck v. Kuykendall, supra.

Requirement of License From Interstate Carrier for Intrastate Business Only

A state may require one engaged in interstate transportation of passengers by a bus to secure a license to transact intrastate business. Such requirement is not an unlawful interference with interstate commerce so far as it affects a carrier who does not show what portion of his business is intrastate, or that intrastate and interstate commerce are so commingled that a separation of one from the other is not reasonably practical, or that the interstate business may not be effectively and economically transacted independently of the intrastate business. Interstate Buses Corporation v. Holyoke Street Railway Company, 273 U. S. 45, 71 L. Ed. 530.

General Rules of Georgia Public Service Commission

General Rule 2 of the Georgia Public Service Commission reads:

". . . no motor vehicle shall be operated for the transportation of persons or property for hire over the public highways of this State, until the owner shall have first applied for and received a certificate of public conveneince and necessity from the Commission authorizing such operation."

General Rule 5 contains a similar provision.

Under the decisions of the Supreme Court of the United States a State may not require a certificate of public convenience and necessity as a condition precedent to the use of the State's highways in interstate commerce. If the rules of the Georgia Commission are construed only to apply to intrastate operators, the rules are valid. As to interstate operators the rules are unlawful.

Reasonable Toll for Use of Artificial Facility Built by State

In Huse v. Glover, 119 U. S. 543, 30 L. Ed. 487, the facts were that the state of Illinois constructed locks and dams on the Illinois River and prescribed rates of toll for the passage of vessels through the locks. The Supreme Court upheld the right of the State to exact such tonnage duties, and said that the exaction of tolls for passage through the locks was as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream.

Tax for Use of State Highway Is Proper When Graded According to Number and Capacity of Vehicles

A carrier contemplating the use of the highway of a state exclusively in interstate commerce may be required to pay a tax, not required of persons using automobiles on the highways generally, for the maintenance and repair of the highways and the administration and enforcement of the laws governing the use of the same. In Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, the court considered an Ohio Act which provided that a motor transportation company operating within the state should pay a tax graded according to the number and capacity of the vehicles used. Clark operated as common carrier a motor truck line between Aurora, Indiana, and Cincinnati, Ohio, exclusively in interstate commerce without paying the tax. A bill was brought to enjoin the Public Utilities Commission from enforcing against Clark the provisions of the Act on the ground that the state was without power to impose a tax for the maintenance and repair of the highways. In its opinion the court said:

"The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to insure safety and convenience and the conservation of the highways. Morris v. Duby, No. 372, decided April 18, 1927 (274 U. S. 135, ante, 966, 47 Sup. Ct. Rep. 548). Users of them although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use."

Mileage Tax for Use of Highways Is Proper

An interstate motor carrier using the public highways of the state cannot defeat the collection against it of a mileage tax for the use of the highways as violating the Commerce Clause of the Federal Constitution merely because the tax on intrastate carriers is based upon gross receipts, in the absence of anything to show that in actual practice the tax complained of falls with disproportionate weight on it. In Intrastate Buses Corporation v. Glodgett, 276 U. S. 245, 72 L. Ed. 551, the facts were that appellant was engaged exclusively in interstate commerce and sought to restrain the tax commissioner of Connecticut from levying a tax upon it of one cent for each mile of highway traversed by its motor vehicles used in interstate commerce. The contention was made that the particular scheme of taxation adopted by Connecticut imposed this tax in addition to statutory charges already made for the use of the highways in interstate commerce and that both in purpose and in effect the act discriminated against appellant and in favor of those operating motor vehicles in intrastate commerce. After reaffirming its previous decisions to the effect that a state may impose a registration or license fee on those using motor vehicles in the state although engaged in interstate commerce and that a state may impose a reasonable charge for the use of its highways by motor vehicles so employed, the court said:

"To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of

which it complains falls with disproportionate economic weight on it."

And:

"It is for appellant to show that the aggregate charge bears no reasonable relation to the privilege granted;"

and that the court could not see from a mere inspection of the statutes that the mileage tax was a substantially greater burden on appellant's interstate business than was its correlative, the gross receipts tax, on comparable intrastate businesses.

In Carley & Hamilton V. Snook, 281 U. S. 66, 74 L. Ed. 704, the court reiterated the principle that a tax imposed by a state on interstate carriers of motor vehicles ostensibly for their use of state highways must in order not to impose a forbidden burden on interstate commerce bear some reasonable relation to the use of the state's facilities by the carrier, and that a state may by different statutes impose two taxes upon the same subject-matter where the total tax if imposed by a single taxing statute would not transgress the Due Process Clause. In the case last cited the actual decision related only to the use of motor cars in intrastate commerce.

Federal Highway Act No Bar to Regulation of Highways by State

In Buck v. Kuykendall, supra, the Supreme Court ruled that a state could not condition the use of its highways in interstate commerce by automobile vehicles upon the securing of a certificate of public convenience and necessity from a state official and stated that the provision of the Washington statute was a regulation not of the use of its own highways but of interstate commerce. In its opinion the court said that such state action is forbidden by the Commerce Clause, and "it also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways."

In Bush & Sons Company v. Maloy, supra, the Supreme Court recognized that the case presented a feature which was not present in the case of Buck v. Kuykendall, supra, in that the highways in question in the Bush & Sons Company case were not constructed or improved with Federal aid. The court said:

"This difference does not prevent the application of the rule declared in the Buck case. The Federal aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be opened to interstate commerce."

In Morris v. Duby, 274 U. S. 135, 71 L. Ed. 966, after affirming the right of a state to forbid the use by an interstate carrier on its highways of trucks loaded in excess of a certain amount, the Supreme Court disapproved the argument that the agreement between the national and state governments made at the time the Federal aid road was constructed required that the weight of truck and load which was permitted by the state when the agreement was made binds the state contractually to continue such permission.

In Carley & Hamilton v. Snook, supra, the court disapproved the argument that the registration fees provided under the laws of California were tolls prohibited by the Federal Highway Act. Section 9 of the latter act provides that all highways constructed or reconstructed under the provisions of the act shall be free from tolls of all kinds. The Supreme Court said:

"Such fees were a common form of state license tax before the Federal Highway Act was adopted in 1921. That act contemplated the continued maintenance by the states of state highways, constructed with Federal aid, the expense of which must necessarily be defrayed from revenues derived from state taxation. It cannot be supposed that Congress intended to procure the abandonment by the states of this well-recognized type of taxation without more explicit language than that prohibiting tolls found in section 9."

Requirement of Insurance on Interstate Business of Motor Carriers

In Barrett v. City of New York, 232 U. S. 14, 58 L. Ed. 483, the court considered an ordinance of the city of New York covering expressmen and the provisions of which were sought to be applied against the Adams Express Company in conducting an interstate business. The ordinance provided that a bond should be given for each and every vehicle licensed and the bond was to be conditioned "for the safe and prompt delivery of all baggage, packages, etc., entrusted to the owner or driver of such licensed express." The court said that as applied to the company's business of interstate transportation, the bond provision was repugnant to the exclusive control asserted by Congress in occupying the field of legislation with regard to the obligations to be assumed by interstate express carriers.

In Michigan Public Utilities Commission v. Duke, supra, the court considered the provisions of the laws of Michigan requiring an indemnity bond of a *private* carrier engaged in interstate commerce as a condition precedent to his right to continue his interstate business and held that such requirement was a burden upon interstate commerce. The Court said that requiring a bond had no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways and that the police power did not extend so far.

In Clark v. Poor, supra, one contention considered by the Supreme Court was the argument that the decree of the lower court should be reversed because of the provision in the Ohio Motor Transportation Act concerning insurance. The act provided that no certificate should issue until a policy covering liability and cargo insurance had been filed with the Commission. The lower court held that, under Michigan Public Utilities Commission v. Duke, 266 U. S. 570, this provision could not be applied to exclusively interstate carriers and counsel for the Ohio Commission stated in the Supreme Court that the requirement for insurance would not be insisted upon. The facts were that the plaintiffs below had not applied for a certificate or offered to pay the tax required by the Ohio act but had refused to do so, not because insurance was demanded, but because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay any tax. The Supreme Court refused to decide whether under any suggested interpretation, liability insurance, as distinguished from insurance on the interstate cargo, could be required of a carrier engaged solely in interstate Commerce. The decree dismissing the bill was affirmed, but without prejudice to the right of the plaintiffs to seek appropriate relief by another suit if they should thereafter be

required by the Commission to comply with conditions or provisions not warranted by law.

In Sprout v. City of South Bend, supra, the Supreme Court held that an ordinance of a city requiring persons operating motor busses on public highways to furnish adequate insurance for the payment of judgments was not an unreasonable burden on interstate commerce, even when applied to interstate carriers, if the liability was limited to injuries caused within the state to persons other than passengers. In its opinion the court said:

"Objection under the commerce clause is made also to the requirement of liability insurance. There being grave dangers incident to the operation of motor vehicles, a state may require users of such vehicles on the public highways to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries, resulting from their operation. Packard v. Banton, 264 U. S. 140, 68 L. Ed. 596, 44 Sup. Ct. Rep. 257. Compare Kane v. New Jersey, 242 U. S. 160, 167, 61 L. Ed. 222, 226, 37 Sup. Ct. Rep. 30; Hess v. Pawloski, 274 U. S. 352, 71 L Ed. 1091, 47 Sup Ct. Rep. 632; Clark v. Poor, 274 U. S. 554, 557, 71 L. Ed. 1199, 1200, 47 Sup. Ct. Rep. 702. It may, consistently with the Federal Constitution, delegate by appropriate legislation a part of this power to a municipality. Such provisions for insurance are not, even as applied to busses engaged exclusively in interstate commerce, an unreasonable burden on that commerce, if limited to damages suffered within the state by persons other than the passenger. Whether the insurance here prescribed is, because of its scope, obnoxious to the commerce clause, we need not inquire. Compare Barrett v. New York, 232 U. S. 14, 33, 58 L. Ed. 483, 491, 34 Sup. Ct. Rep. 203; Michigan Pub. Utilities Commission v. Duke, 266 U. S. 570, 577, 69 L. Ed. 445, 449, 36 A. L. R. 1105, 45 Sup. Ct. Rep. 191. For the ordinance is void because of the imposition of the license fee."

Under the decision of the Supreme Court in the case of Packard v. Banton, 264 U. S. 140, 68 L. Ed. 596, it is clear that a state may require intrastate operators of motor vehicles to secure insurance for the protection of persons injured by their operation and for damage to property or cargo. Section 5 of the Motor Carrier Act of Georgia of 1929 provides for bond with adequate security for the protection in case of passenger vehicles of the passengers and baggage carried and of the public against injury proximately caused by the negligence of such motor carrier, its servants or agents, and in cases of vehicles transporting freight to secure the owner or person entitled to recover therefor against loss or damage to such freight for which the motor carrier may be legally liable, and for the protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants or agents. General Rules 11, 12, and 13 of the Georgia Commision relate to insurance requirements, and are valid as to intrastate operators.

State May Not Make Private Interstate Carrier a Common Carrier by Legislative Act

In Michigan Public Utilities Commission v. Duke, supra, the court held that the imposition by the state of Michigan upon one engaged in transporting merchandise for a single manufacturer from his plant to a destination in another state of the duty to use his equipment as a common carrier, and preventing him from using it exclusively to perform his contracts, and imposing upon him all the duties and statute liability of a common carrier, and the obligation of furnishing an indemnity bond, was an unlawful burden on interstate commerce.

In Frost v. Railroad Commission of the State of California, 271 U. S. 583, 70 L. Ed. 1101, the Supreme Court held that a private carrier cannot be converted against his will into a common carrier by mere legislative command and that a private carrier is unconstitutionally deprived of his property without due process of law by a state requiring him to become a public carrier in order to secure a permit to use the public highways for transportation purposes.

The two cases last cited do not conflict with prior decisions holding that the states may enact laws requiring private, or non-common, motor vehicles to bear their full and fair share of the cost of highway upkeep in proportion to the benefits they derive from the use of and the damage that they do to the public highways, or that such private vehicles are subject to the state laws protecting public order and safety. Furthermore, common carrier busses and trucks may properly be subjected by the states to the additional principles of the common or statute law applying to common carriers engaged in intrastate commerce, including the regulation of their rates and charges. Whether a motor vehicle is being used as a private or common carrier must be determined from the facts.

Conclusion

From the decisions herein discussed it may be concluded that the Congress may enact legislation covering the entire field of regulation of motor vehicles when engaged in interstate commerce and that such regulation, the Congress having plenary power, will supersede any existing State legislation and render void any future regulation by the States of such commerce. Until the Federal government acts, and thereafter to the extent that the field is not covered by the laws enacted by Congress, the States may for the protection of the persons and property of its citizens and for the preservation of its public highways, pass such reasonable statutes and through its public service commissions prescribe such reasonable rules as are necessary for the purposes named, even though such statutes and regulations have an indirect effect on interstate commerce. Some states have not exerted their full power; others may have exceeded their power, but the present large use of the highways by motor vehicles engaged in interstate commerce and the probable increase in such use justifies the exercise by the States of all their power for the protection and promotion of public safety and order and for the preservation of the States' highways.

THE JUNIOR BAR MOVEMENT

By Matthew O. Tobriner
Member of the San Francisco Bar

In three large cities of this country associations of young lawyers have been organized, limited to those who have practiced less than a certain number of years or who have not attained a certain age. Such a movement is probably unique in this country. In San Francisco, Los Angeles and Oakland, California, these junior bar organizations are active, functioning bodies.

It is true that other occupations furnish examples of self-organization by their younger members. Hundreds of Junior Chambers of Commerce have been organized in the past few years. When the writer was in Italy some time ago he stood in the Coliseum at Rome watching a stream of young black-shirted fellows pour into a black-rimmed bowl: the younger Fascisti organizations that had come to honor Mussolini, their chief. Youth in law, in business, in war, would speak for itself. These organizations make its voice articulate, giving it a chance to find its common opinions, to express its views, and thereby itself.

But the chief interest of the general bar must be in their accomplishments. The Junior Committee of the Los Angeles Bar Association has now been functioning for two years and counts a membership of four hundred and twenty-nine lawyers who have practiced less than five years; The Lawyer's Club of Oakland County, two and a half years old, has now sixty active members, practically all of whom are attorneys less than thirty-five years of age; The Barristers' Club of San Francisco, after one and a half years, counts a membership of practically three hundred and fifty lawyers who have practiced less than seven years. If these organizations are of value they must by now have a record of accomplishment.

Taine in his Introduction to English Literature remarks that no social phenomenon can be analyzed without a comprehension of the conditions which have produced it, and this rule applies even to junior bar organizations. The motives that prompted these associations were dual. Some young lawyers wanted a means for meeting other members of their profession. Others wanted a chance to work toward the improvement of the legal instrument with which they had daily contact. When the Barrister's Club of San Francisco was organized, the two theories clashed. Part of the organizing group wanted a social luncheon club only; others insisted upon provision for smaller sub-groups, like the sections of the State Bar of California, which could study specific parts of the law. The argument lasted until after midnight and ended by a compromise; the luncheon meetings were to be the primary function but sub-groups could be formed to study various legal problems.

To consider then, the record of the organizations as to their primary purpose;—the meetings of the three groups. The San Francisco and Oakland organizations have met monthly, calling on speakers on legal and professional problems as well as subjects allied to the law, such as Law and Aviation, the Lawyer and the Stock Situation. When changes in the law, such as the Municipal Court, were inaugurated, these were explained to the membership. The Los Angeles group has a similar record and likewise conducted the regular meeting of the Bar Association at which Dean McMurray of the University of California School of Jurisprudence was guest speaker. These meetings have been well attended; they have made for better acquaintanceship among attorneys and have helped to solidify the bar.

As to the second purpose of the organizations, legal research, very recently the ten or fifteen men who composed the Corporation Section of the Barristers' Club completed a proposed statute providing for compensation to dissenting stockholders in corporate reorganizations. These men had met faithfully once each month to discuss far into the night the proposed measure. The writer can testify that he had at those meetings the thrill of the honorable law-school "bull" session, and, from the enthusiasm shown, he knows his enjoyment was shared by others. This year the Barristers' Club is organizing another section to devise what should be done with the somewhat defunct Cartwright Act; it has as well a Probate Section, a Public Utilities Section, and a Committee working on the problem of legal education. In Oakland the Lawyer's Club investigated the specific problem of what would be the state of the title of the land on which the court house now stands if they should be blessed with a needed new one. In Los Angeles, The Junior Committee has supplied the State Bar with practically its entire force of examiners in connection with the reprimanding, suspension and disbarment of members. The three groups have likewise undertaken the man-sized job of aiding the California Code Commission by reading every one of the two hundred volumes of the reports of the Supreme Court of California and the ninety Appellate Reports to find the cases wherein statutes have been expressly or impliedly repealed or declared unconstitutional.

This, then, is the story of the junior bar. Its accomplishments are not particularly important nor its record unusual, but the spirit behind these groups is, the writer believes, significant. It is, for instance, encouraging to find a dozen or so young men giving up their evenings to work out a part of the corporation law when there is no chance for reward in money or in recognition for their work. These men are striving to make the law somewhat better for their association with it, and it is from such efforts that the law will raise itself to meet better the need of society.

It must be the lawyer who will serve as the great force in building the law. The lawyer knows the law's inadequacy. The junior bar movement is evidence that the younger lawyer wants to do his part, to lend his minor help, in this legal construction.

DEPARTMENT OF CURRENT LEGISLATION

Federal Legislation of 1930

By Middleton Beaman, Charles F. Boots, Alfred K. Cherry, Allan H. Perley, Henry G. Wood, John O'Brien, Eugene J. Ackerson, Thomas R. Mulroy

Foreign Relations

A VERY interesting indication of the encroachment of economics on politics in foreign affairs, is supplied by Public 304 creating a Foreign Agricultural Service and keeping its officers in the Department of Agriculture instead of putting them into the Department of State. The law authorizes the Secretary of Agriculture to acquire and disseminate information on world production and distribution of agricultural products, and to investigate abroad farm management and any economic phases of agricultural activity, and to conduct abroad any activities (including demonstrations of standards of American agricultural products) which the Department of Agriculture is, or may be, authorized to engage in. The purpose of the legislation, as revealed in the committee reports, is to aid in the effective administration of farm relief legislation, and to insure an adequate service of information to agricultural producers affected by world conditions of production and demand. Similar bills had passed the House in 1924, 1926, and 1928.

This extension of the domestic activities of the Department of Agriculture abroad puts into permanent legislative form authority now carried in annual appropriation bills, and is crystallized by placing the officers of the Department, now abroad, in the Foreign Agricultural Service of the United States, and by authorizing additional appointments, all such officers to be designated as agricultural attaches or by other appropriate title, who are to be attached to the diplomatic missions or consulates of the United States, thus placing the Agricultural Service abroad on a footing comparable with the Foreign Commerce Service.

Public 445 authorizes appropriations to be made for the furnishing of living quarters to civilian officers and employees of the Government "having permanent station" in foreign countries. Where quarters are not available in Government buildings an allowance is authorized in lieu thereof. The provisions of the Act apply only if the officer or employee is a citizen of the United States.

Public Resolution 81 is interesting in its recognition of the new status of British dominions. It authorizes the appointment of a minister to the Union of South Africa at a salary of $10,000 a year.

Public 488 provides that an American passport may be renewed for periods of not to exceed two years each, provided the final date of expiration of such passport shall not be more than six years from the date of original issue. A fee of $2 will be collected for each renewal. Passports which were issued within a period of two years prior to the date of the enactment of Public 488 may be renewed up to a period of six years from the original date of issue in the same manner as a passport issued after the enactment of such Act. The Act further provides for the reduction of the fee for an original passport to $5. However, the application fee of $1 as provided in the Act of June 4, 1920, is still required.

Further progress towards placing men and women on an equality as regards citizenship status is made by Public 508. Under the Cable Act of September 22, 1922, a woman citizen did not lose her citizenship by reason of her marriage to an alien eligible to citizenship, but if during the marraige she resided abroad for two years in her husband's country or for five years in any place, she was presumed to have lost her citizenship. This presumption is repealed.

The Cable Act also provided that a woman who had lost her citizenship prior to the passage of the Act by reason of her marriage to an alien eligible to citizenship could be naturalized without declaration of intention and upon proof of only one year's residence instead of the five-year period ordinarily required of petitioners for naturalization. Public 508 makes it still easier for her to regain her citizenship. She is relieved from requirement of declaration of intention, certificate of arrival in this country, and from any proof of residence, nor need she state in her petition that it is her intention to reside permanently within the United States. The petition may be filed in any naturalization court regardless of the petitioner's residence, and if she has appeared before a naturalization examiner the petition may be heard immediately after filing without waiting the customary ninety days. These privileges are not granted to a woman ineligible to citizenship nor to a woman who has acquired any other nationality by affirmative act.

Before the passage of Public 508, the Immigration Act of 1924, as amended, gave non-quota status to a woman who was a citizen of the United States and who prior to September 22, 1922, lost her citizenship by reason of her marriage to an alien, but who at the time of her application for an immigration visa is unmarried. Public 508 extends the non-quota status to a woman who lost her citizenship by reason of her marriage to an alien regardless of the date of the marriage and regardless of her marital status at the time of applying for an immigration visa, and gives the same non-quota status to a woman who lost her citizenship by reason of a loss of citizenship by her husband or by marriage to an alien and residence in a foreign country.

Public 348 grants to Chinese wives of American citizens, married prior to May 26, 1924, exemption from the provisions of the Immigration Act of 1924, barring from admission aliens ineligible to citizenship.

Two more settlements of war indebtedness of foreign governments were made, leaving only two settlements to be made—Russia and Armenia.

Public 24 approves the settlement made by the World War Foreign Debt Commission with France. The amount to be funded into bonds is $4,025,000,000, to be paid in annual installments ending June 15, 1987, on a fixed schedule starting with payments of $30,000,000, the final installment being between $113,000,000 and $114,000,000. There is no interest on the payments before 1930; thereafter the rate starts in at 1 per cent, reaching 3½ per cent after 1965.

Public 307 authorizes the Secretary of the Treasury to conclude an agreement for the settlement of the indebtedness of Germany for the awards of the Mixed Claims Commission and for the cost of the United States Army of Occupation. For the former item Germany is to pay 2,121,600,000 reichmarks, evidenced by bonds payable in semi-annual installments from 1930 to 1981, without interest. If any of the bonds have not matured when all the payments contemplated by the Settlement of War Claims Act of 1928 have been completed, the unmatured bonds shall be cancelled. Payment for the cost of the Army of Occupation is to be 1,048,100,000 reichsmarks, evidenced by bonds payable in semi-annual installments from 1930 to 1966, without interest. In both cases the bonds are to be payable in United States gold coin in an amount in dollars equivalent to the amount due in reichsmarks, but Germany is to undertake that the reichsmark shall have and retain a mint parity of 1/2790 kilogram of fine gold.

Administration

Most discussed among changes in the administration of the government is the new device for prohibition enforcement, which still continues in the Treasury control over a substantial portion of the means used to circumvent the Volstead Act. Public 273 establishes a Bureau of Prohibition, headed by a Director of Prohibition, in the Department of Justice, and transfers to the Department of Justice the duty of enforcing the National Prohibition Act. The transfer was effected by the creation, by joint arrangement of the Attorney General and the Secretary of the Treasury, of an Enforcement Division of the Bureau of Prohibition in the Treasury, and by transferring from this division to the newly established Bureau of Prohibition in the Department of Justice the personnel, records, and equipment of the Treasury Bureau. By the new law the Attorney General is charged with the investigation and determination of the violations of, and the apprehension and prosecution of offenders against, and the effecting of seizures and forfeitures under, the National Prohibition Act and the internal-revenue laws in so far as there is a violation of the National prohibition laws. The necessary powers to carry out these duties are conferred upon the Attorney General. The issuance of permits for the manufacture of industrial alcohol and the collection of internal-revenue taxes on liquor where there is no violation of the National Prohibition Act remain in the Treasury Department under the supervision of the newly created Bureau of Industrial Alcohol. The law makers recognize, however, that besides its legitimate use, such alcohol may be deindustrialized and serve as a source of supply for the bootlegger. They, therefore, vested in the Attorney General a wide power of interposition in the working of the Bureau so that he may assure himself that administrative levees are erected to keep the stream of alcohol from overflowing its industrial banks. Regulations relating to permits and the form of applications, bonds, permits, records, and reports under the prohibition laws, are to be prescribed jointly by the Attorney General and the Secretary of the Treasury. The Attorney General also is given power to act jointly with the Secretary of the Treasury in passing on applications for permits or renewals, and where he does no permit can be granted or renewed without joint approval. Provision is made for investigation by the Attorney General of violations of the National prohibition laws with respect to the functions which remain in the Treasury Department, and the law contains requirements that the Treasury place at the Attorney General's disposal information with respect to applications for, and investigatons of, alcohol permits. A section authorizes delivery of seized vessels and vehicles to the Department of Justice for use in the enforcement of the National Prohibition Act.

The federal narcotic drugs act is based on taxation of the drugs and license taxes on persons who may legitimately deal in them or use them professionally, so that the enforcement of the act is retained in the Treasury and not transferred with Prohibition, to Justice. With a view to improving the efficiency in the enforcement of the Federal narcotic drug laws, however, Public 357 was enacted. The Act centralizes the enforcement functions under the narcotic laws in a Bureau of Narcotics in the Treasury Department, under a Commissioner of Narcotics. The assessment and collection of revenue from narcotic drugs remains with the Commissioner of Internal Revenue.

In order to aid the Commissioner of Narcotics in determining the amounts of crude opium and coca leaves to be imported into the United States under the Narcotic Drug Import and Export Act, the Surgeon General of the Public Health Service is authorized to make certain studies and investigations relating to the use of narcotic drugs and the amount necessary to supply the medicinal and scientific needs of the United States.

Section 6 of the Act modifies certain provisions in the Narcotic Drugs Import and Export Act (U. S. C., Title 21, § 171) by authorizing the Commissioner of Narcotics to permit an additional amount of coca leaves to enter this country, provided that such coca leaves shall be decocainized under his supervision.

The purpose of this section is to make available an increased quantity of certain extracts derived from coca leaves which enter into the manufacture of a certain beverage widely used in the United States and foreign countries.

The Act further provides that the Secretary of the Treasury shall co-operate with the several States in respect to their narcotic drug problems, particularly those relating to legislation and the prosecution of narcotic cases before the courts.

In order to aid in the prevention of smuggling of narcotic drugs into the United States and in order to bring about closer co-operation between customs officers and narcotic field officers, the Commissioner of Narcotics may delegate authority and power of customs officers to narcotic field officers.

Public Resolution 96 provides that the Act (Public 357) shall take effect on July 1, 1930.

Co-ordination of the activities of the Public Health Service and the improvement of its work are the objects of Public 106. In addition to providing for the assignment of officers of the Service to other departments (a power already exercisable to a limited extent), the law permits the assignment of officers to institutions outside the Government for the purposes of research, and authorizes the use of the facilities of the Service by health officers and scientists engaged in special study. Greater flexibility of appointment and promotion of officers and employees is allowed by this Act, and the salary of the Surgeon General is increased. The Secretary of the Treasury is permitted to create new divisions in the Hygienic Laboratory, and the name of the Advisory Board of the Hygienic Laboratory is changed to the National Advisory Health Council. Authority is granted to appoint five additional members of the Council.

Public 251, enacted shortly after Public 106, establishes a National Institute of Health under the administrative control of the Public Health Service by designating the Hygiene Laboratory to be the National Institute of Health, and by making the laws and appropriations pertaining to the "Laboratory" apply to the "Institute," and authorizes appropriations up to the sum of $750,000 for additional buildings at the site of the "Laboratory." A gradual enlargement of the Hygienic Laboratory is contemplated, with the purpose of extending and making effective existing public and private efforts to ascertain the cause, prevention, and cure of diseases affecting human beings. Gifts and trust funds for buildings, equipment, research, and research fellowships are authorized to be accepted. Facilities of the Institute are to be made available to health authorities of States, counties, or municipalities for the purpose of study and investigation.

The Radio Act of 1927 established a commission for the administration of the Act, but provided that at the end of a year after the first meeting of the commission the greater part of the functions of the commission should be transferred to the Secretary of Commerce, leaving only appellate jurisdiction in the commission. The functions of the commission were twice continued by special Acts, the last time until December 31, 1929, but Public 25 practically makes the commission a permanent body, providing that the powers and authorities of the commission shall be continued to be vested in it until otherwise provided by law, and continues the salary of the members at $10,000 a year until further Act of Congress. The Act also authorizes the appointment of a chief engineer at a salary of $10,000 a year, with not more than two assistant engineers at salaries not to exceed $7,500 a year each.

The failure of an ex-officio interdepartment board appears in Public 412 reorganizing the Federal Power Commission, the statute was enacted to carry out the President's recommendation that the commission be composed of members able to devote their whole time to its work. This body has heretofore been composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. The Secretaries, having little time to devote to this work, necessarily acted through subordinates. Under this Act the commission will be composed of five members appointed by the President and confirmed by the Senate, who will each receive an annual salary of $10,000. Added powers are given to the commission with respect to the appointment of officers and employees.

Another extension of the work of the Public Health Service consecrated by Public 203 which provides for the supervising and rendering of medical services in Federal, penal and correctional institutions by the personnel of the Public Health Service, and authorizes the detail of commissioned officers and other personnel of the Public Health Service to the Department of Justice for these purposes.

Public 270 was enacted to relieve overcrowded conditions in Federal prisons. It provides for the erection of two penal institutions for the confinement of male persons convicted of offenses against the United States; one to be located in the northeastern section of the United States, and to be of the penitentiary type, and one to be located west of the Mississippi River, and to be of the reformatory type for the confinement of youthful offenders. The duty of selecting sites is imposed upon the Attorney General.

An interesting innovation in customary procedure appears in Public 107 which authorizes an appropriation of $50,000 for the purposes of a study and report on the conservation and administration of the public domain. The money is made available to the President without the usual limitations upon employment and expenditure placed upon agencies of the Government, and the law contains no stipulation as to how the study is to be conducted, or what kind of report or when the report is to be made. The matter is placed wholly in the hands of the President.

Public 247 provides that upon failure of an addressee to remove any collect-on-delivery parcel from the post-office within fifteen days from the first attempt to deliver or from the first notice of arrival at the office of address, it may be returned to the sender, charged with return postage, regardless of any time limit for delivery specified on the parcel by the sender. A demurrage charge of not exceeding five cents per day may be collected when delivery has not been made to the addressee or to the sender until after the expiration of the fifteen-day period. The bill was recommended by the Postmaster General to prevent the use of the post office as storage places by some postal users.

Public 132 authorizes the entering into of ocean mail contracts for the carriage of mail to and from ports of Canada under the same conditions and subject to the same restrictions as in the case of ports of other countries. The Merchant Marine Act, 1928, which this Act amends, prohibited the awarding of a contract to any line operating between the United States and Canada other than a line to Nova Scotia.

Under Section 402 of the Merchant Marine Act, 1928, the Postmaster General, in the selection of ocean mail routes, was directed to give consideration to the actual and estimated future volume of mail over any contemplated route. This provision is amended by the present Act so that consideration is also to be given to the volume of commerce, thus emphasizing the use of postal subsidies as a means of encouraging the establishment of regular American lines of steamers.

HOW TO DEAL WITH THE UNLAWFUL PRACTICE OF LAW

Conditions Which Have Produced Present Situation as to Practice of Law — Plan of Solving Problem by Legislation and Prosecution—View That Practice Can Best Be Restricted to Lawyers by Improvements Which Will Gear It Up to Meet Increasing Demands of Our Complex Society

By Henry A. Shinn
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ON being advised to prosecute certain literary piracies, Charles Dickens rejected the counsel, saying, "My feeling is the feeling common, I suppose, to three-fourths of the reflecting part of the community in our happiest of all possible countries, and that is, that it is better to suffer a great wrong than to have recourse to the much greater wrong of the law. I shall not easily forget the expense and anxiety, and horrible injustice of the Carol Case, wherein, in asserting the plainest right on earth, I was really treated as if I were the robber instead of the robbed. I know of nothing that could come of a successful action, which would be worth the mental trouble and disturbance it would cost."[1] That statement, now more than three quarters of a century old, still expresses the sentiment and attitude of many toward the law. Without disparaging the value of the many reforms, including the Judicature Acts of 1875 which were in a large measure brought about by Dickens' caustic attack on the expense, delay, and uncertainty of the law, it may be well to ask if it is not time for another Bleak House or at least a rereading of the old novel.

The law's delay is not an expression but a fact. Uncertainty, expense, and delay are not mere words that have become inseparable by usage. This tyrant-like triumvirate is admitted, by every branch of the profession as well as by those on whom it is practiced, to be enthroned with justice in nearly every case. In leading the attack upon this triumvirate, the Institute of Law at Johns Hopkins University is endeavoring, through research, through an examination of actual cases, to discover the basic causes for this triple threat against sure and speedy justice. The Institute's findings in cases examined in the State of New York reveal facts identical with those which were provocative of Dickens' Bleak House. An interview with Professor Herman Oliphant, published in the New York Times[2] concerning the work of the Institute in New York, recites cases in which adjournments, motions to dismiss, appeals, reversals, new trials, and the like kept the cases in court in some instances for as long as seven years. In many of these cases the litigants grew tired of the suspense and expense and settled out of court; in others the costs and attorneys' fees of the successful parties were far greater than the amount of the judgment, which in some cases ran high into five figures. There is no reason to doubt that the condition found in New York exists in every other state of the Union. Even though the cause is just and the amount involved large, yet legal controversies restrained by the triple alliance of uncertainty, expense, and delay have become

"fights for a plot
Whereon the number cannot try the cause."

The more or less recently cut channels through which many legal problems are flowing are evidence that business and business men refuse to follow the circuitous and back-tracking route through the courts. Business, like Dickens, having become weary and wary of the law office seeks redress through other channels. Twenty-five years ago practically every tangle that contained even a single legal thread was unravelled in a lawyer's office. The drawing of wills, the collection of bad debts, the transfer of realty, the organization of corporations, and the drawing of trust agreements demanded the services of an attorney as surely as a broken arm demanded the attention of a doctor. But nowadays a continually increasing amount of this practice is going to corporations and quasi-law offices. Trust companies, banking corporations, title companies, adjusters, collection agencies, notaries, realtors, corporation organizers, and others have shorn the licensed attorney of most of his protected privileges with the possible exception of that of appearing before the courts.

There are certain economic reasons for this new adjustment in the practice of the law. Modern business moves more rapidly than the law. It prefers an immediate settlement before an adjuster to an adjudication before a court which is blocked with uncertainty, expense, and delay. It prefers the ready service and business-like methods of a trust company to the unorganized procedure of the average law office. It prefers a fixed charge, based upon a definite schedule, to a law fee which is uncertain in amount. The complacent independence of the roaring nineties has given way to method, organization, and service. American business has enthroned and proclaimed service as the king word of the English language. Its spirit is expressed in the dispatch with which each order is served. The American public not only expects but demands service, and if the law office is unable to give prompt attention, the client turns to seek it elsewhere. Thus, banks and title companies are draw-

1. Holdsworth—Charles Dickens, a Legal Historian—p. 80.
2. New York Times, March 9, 1930—High Cost of Law Suits.

ing wills; adjusters are settling claims; and realtors are examining abstracts.

Throughout the country, bar associations have recognized with much concern the growth of these new channels through which legal business is passing. They are aware of the fact that much water is flowing around the legal dam. In some states the profession is ready to remodel or remove the dam, while in others it seeks through prosecution[3] and legislation to cut off these new channels. Senator Frank Hurley of Massachusetts introduced a bill in the senate at the last meeting of the legislature of that State to restrict law practice to lawyers. The bill reads in part as follows:

". . . no corporation shall draw agreements, or other legal documents not relating to lawful business, or draw wills, or practice law, or give legal advice or legal information, or hold itself out in any manner as being entitled to do any of the foregoing acts by or through any person orally or by advertisement, letter, or circular; provided that the foregoing shall not prevent a corporation from employing an attorney in regard to its own affairs or in any litigation to which it is or may be a party."

The Trust and Title Company Committee of the California State Bar Association in its report published in the State Bar Journal for July, 1930, recommended for consideration by the State Bar "that appropriate court proceedings be prosecuted against any banks, trust companies, and title companies and against the representatives thereof that persist in any of the unlawful practices (drawing wills and trust agreements) herein specified; that appropriate disciplinary proceedings be prosecuted against any member of the bar who persists in aiding banks, trust companies, or title companies to practice law, or who violates any of the ethical obligations as herein and in the Rules of Professional Conduct defined."

Many members of the bar, however, feel that the so-called unlawful practice of the law cannot effectively be removed by either prosecution or prohibitive legislation. They realize that the evils of the present system have produced the parasites that feed upon it, and that this parasitic growth can, therefore, be best removed by remedial rather than prohibitive legislation. It is the contention of these members that the practice of the law can best be restricted to lawyers through a simplification of procedure, through raising the standards of admission to the bar, through a greater respect for the ethics of the profession, and through the adoption of more efficient methods. In general, nineteen-hundred-and-now law practice must be made to function in a manner that will meet the increasing complexity of society. Legal machinery must be geared up to move in time with modern business.

II

Simplification of procedure has long been the cry of the legal reformer. And most writers are agreed that the regulation of procedure by rules of court rather than by our legislative codes is the fundamental step in the simplification process.[4] Legislative-made rules of procedure, if carefully prepared by the bench and the bar, may be adequate for a time, but they soon become obsolete unless continually amended. Rules of procedure that permitted the courts to keep pace leisurely with the sail boat, the ox-cart, and the pony express are not quite adequate to cope with this motor-driven age of ours.

When England found that her rules of procedure which grew from precedents in individual cases had become too complicated, she reformed the rules but left the power to alter and make new rules in the court, while in the United States the state legislatures adopted codes of procedure which the courts are bound to follow to the very word without the power to change. The result is that English procedural rules have developed along with increased demands, while those of the states have remained static, paralyzing the courts under the increased and growing volume of business. This state of paralysis is at least partly explanatory of the action of both Congress and state legislatures in creating boards and commissions to do the work that would regularly have gone through the courts. It is interesting to note, as an argument from example for restoring the rule-making power to the courts, that both Congress and state legislatures in creating special courts, commissions, and administrative boards have vested in each of them the power to make their own rules of procedure. Are there any valid reasons why our regular courts should be given less freedom of action in matters of adjective law than boards and commissions? The so-called unlawful practice of the law can be eliminated very materially by restoring to the courts freedom of action.

Suppose, for example, physicians who know the anatomy and the chemistry of the human machine, who know the basic laws by which it functions were compelled to practice medicine under a code adopted some thirty or forty years ago. Twilight sleep and many other developments in the practice of medicine would be unlawful, and possibly, unknown. If the freedom to grow and develop is curbed, the incentive to investigate is killed. The adoption of legislative codes of procedure has not only paralyzed the courts, but it has dwarfed the incentive to investigate procedural reform.

The present plan of regulating procedure by code is at once cumbersome, inflexible, and static. It is cumbersome in that it is impossible for a legislature to make detailed rules of practice that will fit situations about which it knows little. The personnel of the average legislature is such that it is little interested in rules of procedure, and not well qualified to consider them. It is inflexible in that the codes are laws which the courts cannot change or alter. It becomes static in that a legislature, having once adopted a code of procedure, is reluctant to reconsider so uninteresting and nonpolitical a subject.

On the other hand, court-made rules tend to free and simplify procedure: First, in that the court which uses the rules is a specialist and professional in making them; Second, in that court-made rules are more general and elastic; Third, in that the court continually using the rules is more prone than

3. The Board of Bar Commissioners of the State of Idaho recently directed proceedings against the Eastern Idaho Loan and Trust Company and its President to show cause why they should not be punished for contempt of court. The Supreme Court of Idaho in that case, In re Eastern Idaho Loan and Trust Company et al., 288 Pacific Reporter 157, held that the drawing of wills and trust agreements by corporations was in contempt of court under the laws of the State of Idaho.

4. Charles E. Clark—Code Pleading—p. 33 and note 103.

the legislature to see needed changes; and Fourth, in that the growth of procedure may keep pace with the growth of the law. Under a plan which permits the courts to make their own rules of procedure, twentieth century substantive rights will not be dragged through the courts under nineteenth century rules of procedure. Adjective law will not petrify, while substantive law develops.

A close ally of the rule-making power in the war against delay is summary judgments. In fact, the courts in Connecticut acting under the rule-making power adopted summary judgments as a rule of procedure, effective February the first, 1929. The purpose of summary judgments is to give immediate decisions where no defense or only sham defenses are offered in cases in which a defense, if one existed, could be easily set forth. If the trial judge is of the opinion from affidavits of the parties that there is no defense to the claim, he may give judgment immediately without trial. The power of the court to render such summary judgments is derived from its inherent power to strike out false pleadings. Little if any evidence is needed to prove that this rule of procedure should speed up the work of the court and correspondingly diminish delays. In New York, where the summary judgment rule is used only in actions to recover a debt or a liquidated demand,[5] about one case out of every ten in 1923 was disposed of under the rule. The extension of the rule to cover a larger class of cases, as it does in Connecticut,[6] and its growth through use should greatly increase this ratio.[7]

A great deal of the present delay comes from proving issues and considering evidence which both sides admit. In few places outside of a court room is so much time wasted in proving that which no one would question or deny. It should be possible for the authenticity of papers, letters, and other documents to be passed upon or admitted by the parties before trial so that the time of the court would not be consumed in proving signatures, handwriting, and the like. Mr. Justice Owen J. Roberts, in a recent address[8] before the New York State Bar Association, said: "In one of these oil cases that has been referred to tonight, one of the civil cases tried in equity, I had an opponent who knew the documents in the case as I knew them. We made an agreement that no document need to be proved. . . . Not a letter, and there were hundreds of them, almost I might say thousands, and not a document was proved in that whole trial. . . . That procedure saved, in my judgment, ten days of trial." It should not be a difficult task to provide before trial for the elimination of uncontroverted issues and for the admission, without proof, of authentic documents.

III

The unlawful practice of the law is greatly encouraged by the exceptionally low standards and, in a number of states, the absolute lack of standards for admission to the bar. The low standards problem has been before the American Bar Association for more than twenty years. In 1908 the Association approved a high school education as a minimum requirement,[9] and in 1921 adopted a resolution which provided among other things that every candidate for admission to the bar should give evidence of graduation from a law school which required as a condition of admission at least two years of study at a college.[10] A resolution adopted one year later modified the two years of college to that or its equivalent. Only fourteen states,—New York, Connecticut, New Jersey, Ohio, West Virginia, Illinois, Wisconsin, Michigan, Minnesota, Montana, Kansas, Idaho, Wyoming, and Colorado —have adopted in substance the general educational qualifications recommended by the American Bar Association.[11] Nineteen states require a high school education or its equivalent as general training for admission to the bar, but in the remaining fifteen states one may be licensed to practice without meeting any general educational qualifications. These fifteen states are: Alabama, Arizona, Arkansas, California, Florida, Georgia, Indiana, Maine, Nevada, New Hampshire, North Carolina, North Dakota, Texas, Utah, and Virginia,[12] in all of which not even a grammar school education is required. Any one may become a member of the bar by cramming sufficiently to pass the state bar examination. In Indiana an examination is not required. This, in the absence of general educational qualifications, may have advantages in that the public is not misled by any indicia of ability.

In the commercial world, where only the fittest survive, a high school education at least is indispensable, and rapidly a college training is becoming the rule rather than the exception. The schools of commerce in our colleges and universities are annually turning out thousands of men prepared to cope with the growing complexity of the economic problems of the commercial world. These college trained business men have in their required and elective courses read more law than many of the poorly prepared lawyers who seek to advise them. The blind may, now and then, lead the blind, but they shouldn't hope to direct those who can see. Well trained business men will not seek advice from poorly trained lawyers. Furthermore, the customers of these well-trained commercial men seek legal advice from them. Here is the opening wedge which has drawn away from the law office much of its practice in the drawing of wills, trust agreements, contracts, articles of incorporation, and the like. How best may the bar stop the growth of this practice? Before attempting to curb it through prosecution, as proposed in California or through legislation as introduced in Massachusetts, would it not seem more advisable to raise the standards of admission to the bar so that the general qualifications of its own members are at least equal to those of the clients they hope to advise? In the medical profession quack doctors are the best sellers of patent medicines. Like quack doctors, ill-prepared lawyers have destroyed public confidence in the whole profession. But through a rigid enforcement of higher standards in the medical profession, the quack is being eliminated, and public confidence established. Is not this our proper course: higher

5. Charles E. Clark—Code Pleading—p. 383.
6. A. B. A. J., p. 82, The New Summary Judgment Rule in Conn., by Charles E. Clark.
7. E. R. Finch, Summary Judgments under the Civil Practice Act in N. Y., 49 A. B. A. Rep. 588 (1924).
8. Delivered at the Fifty-second Annual Meeting of the N. Y. State Bar Association, January 18-19, 1929.
9. A. B. A. Proceedings, 1908, p. 17.
10. A. B. A. Proceedings, 1921, p. 37.
11. 1929 Report of the Council of the American Bar Association on Legal Education and Admission to the Bar.
12. Educational Qualifications for Admission to the Bar, by Delger Trowbridge, California State Bar Journal, April, 1930, p. 227.

standards, fewer quacks, more confidence, and less unlawful practice of the law?

The ever-growing complexity of society and the closer inter-dependence of economic problems, both national and international, make it imperative that the legally trained have a thorough general education so that they may better understand the relation of these complex problems of modern society to the law under which they operate. Opponents of higher education for admission to the bar hold out as examples such men as Henry Clay, Abraham Lincoln, and others. One such opponent says:[12] "Measures have been taken in fourteen states of the American Union to eliminate all such men from public life in the future." In the first place, this statement belittles the minds of the men it honors by assuming that they would not rise to the top, regardless of the height of the hurdles established by society. In the second place, it is fallacious in assuming that law and economics are as elementary today as in the time of Henry Clay. It is further fallacious in assuming that, had a college education been a prerequisite to a legal training, a man with the perseverance of a Lincoln would not have found his way through college, as are thousands of poor boys nowadays doing who are possibly not endowed with either the intellect or the brawn of a Lincoln. Standards are not made for men of genius; they are born above them. It is the mediocre that a complex society must guard against.

A liberal education may not necessarily be productive of higher morals, but it should at least tend to lift to a higher plane the sense of one's duty to his client, his professional associates, the court, and the public. Granting, however, that there may not be any inherent causal relation between higher education and higher ethical standards, nevertheless, competition in the struggle for business frequently forces the poorly equipped to do unethical acts. Driven from the field of legitimate practice, he is forced to gain a livelihood by succumbing to various temptations. Thus, within the profession itself there is much unlawful practice of the law.

As further evidence of a causal relation between poor equipment and low ethics, Judge William C. Coleman, addressing the American Bar Association convention in 1929, said: "I believe it is a truism to say that each year those lawyers, who throughout the country are disbarred or disciplined, are, with rare exceptions, men without liberal education." At the same convention, Mr. Emory R. Buckner, United States Attorney for the Southern District of New York, in speaking of the men brought before the Grievance Committee of the New York Bar Association, said: " . . . the overwhelming majority of those men are men who are not graduates and who have not met the requirements for two years of college work which has now been laid down by this Association."

Low ethical standards have possibly brought more abuse on the legal profession and driven more business into other channels than any other weakness in the whole machinery of justice. Public confidence in the efficiency and fitness of the profession should be restored by adopting higher educational and ethical standards. Let the bar do its work well, and the public will again make a beaten path to its door.

It is historic that the bar is ultra-conservative. A profession grounded in principles of law, founded in turn upon precedents centuries old, develops a reverence for established rules. Jeremy Bentham fought long and hard within the profession for reform, but it was not until Dickens wrote Bleak House that the public was aroused, virtually forcing a conservative bar and Parliament to pass the reform bills of 1873 and 1875. The bar should take the lead and not be driven. It should assume the duty of making the machinery of justice function under the increasing activity of modern society. It should carry the fight against uncertainty, expense, and delay. It should oppose the unlawful practice of the law under a banner of reform, rather than under a program of prohibitive legislation, founded upon ultra-conservatism.

12. The University Law School Racket, by Gleason L. Archer, Plain Talk, July, 1930, p. 81.

Journal of Radio Law to Be Published

The Air Law Institute which has published the Journal of Air Law since January, 1930, is to enlarge the scope of its activity by the publication of a new journal to be known as the Journal of Radio Law. The first issue will appear in April, 1931. It will be under the general supervision of Professor Fred D. Fagg, Jr., Director of the Air Law Institute. The Editor-in-Chief will be Louis G. Caldwell, former General Counsel of the Federal Radio Commission, and Chairman of the Standing Committee on Communications of the American Bar Association. He will be assisted by an Editorial Advisory Board.

The Air Law Institute has from the outset recognized that air law properly defined and radio law are two entirely distinct fields of jurisprudence. There is virtually no common denominator except the novelty of the legal problems presented. Nevertheless, for convenience and as a temporary expedient, the scope of the Journal of Air Law was extended so as to cover not only aeronautical law and the law of air rights, but also radio law; and during the past year a number of articles on the latter subject have appeared in the publication. Experience has demonstrated over this period, however, that there is a very real need for a separate journal of sufficient size to permit not only the publication of articles on radio law, but also the maintaining of various services in the form of departments. Instances of this are furnished by the reports of examiners of the Federal Radio Commission which already number over sixty since the institution of the examiner system last September. These are important sources of radio law and must be digested and commented upon from time to time. The same is true of the regulations issued frequently by the Commission in the form of general orders. A large and increasing number of decisions on radio law are being rendered by the courts both in the United States and Europe. There is a constant legislative activity in Congress and to some extent in state legislatures on radio. There is a great field of foreign radio literature both in treatises and periodicals which has been almost unknown in this country.

The proposed journal will not be limited to matters of interest solely to broadcasting stations, but will extend to radio law problems of all kinds.

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Chicago, Illinois

AIDS TO LEGISLATION

The meeting of numerous legislatures in January calls attention to an important function which the profession of the law discharges—too often without due appreciation. All during the past year, as those who read the department of State and Local Bar Associations printed in the JOURNAL will know, committees of the various Bar Associations have been studying important questions within their proper field, and the Bar Associations have been considering and approving or disapproving their recommendations for legislation on such subjects. In few states will the session end without the presentation by the Bar of various proposed well-thought-out measures in the public interest, embodying sound principles for the improvement of the law. Often the proposals will be accompanied by carefully drafted bills.

In other words, the legislatures will have the advantage of the study of a large part of the Bar during the past year on questions which few legislative committees could hope to thresh out satisfactorily to themselves in the short time they could afford to allot to them. The subjects will range from matters exclusively of state interest to proposals—such as the establishment of Judicial Councils—which embody the best thought of the profession on problems common to all the states. It is entirely safe to say that from no other source will the legislatures be afforded such assistance as that represented by the careful spade-work which Bar Committees and Associations have done.

They will also have the advantage of the work that has been done by special organizations. Perhaps the most outstanding gift to alleviate the legislative burden and to make wise legislation easy is the Code of Criminal Procedure which has recently been issued in its final form by the American Law Institute. It is true, as stated in an editorial in the JOURNAL, that a vast number of provisions could be adopted as rules of court, if the courts would simply go ahead and act. It is also equally true that in some states, as a practical matter, the adoption will be by the legislatures or not at all. There is reason to believe that a good many legislatures will appreciate the work that has been done on this important subject, in which the public has displayed so much interest, and will appropriate such portions of the Code as seem to fit the needs of their particular states.

The work of the Commissioners on Uniform State Laws, both the bills which have been recently approved and the list approved in former years, will also represent a carefully completed product for legislative consideration. Many of these will be backed by Bar Association Committees, along with other Association measures. For instance, at its last meeting the Vermont Bar Association decided to urge the adoption of the Uniform Divorce Jurisdiction Act, the Uniform Air Licensing Act, and the Uniform Declaratory Judgments Act. Other Associations have doubtless made sponsorship of such acts a part of their legislative program. The Uniform Child Labor Act, approved at the last meeting of the American Bar Association, will afford states whose legislation is backward in this respect an idea of the position of those having more advanced legislation and an opportunity to bring themselves up to a more generally acceptable standard.

The legislatures in the states which have Judicial Councils will have the benefit of the carefully considered recommendations of those bodies—which recommendations, after all, represent the gratuitous labors of Bench and Bar in the effort to study and help solve the problems of the Administration of Justice. We print in this issue a digest of the report of the New Jersey Judicial Council, which contains a number of recommendations for legislation. The same is true of the reports of other Councils which have been made during the past year. As these Judicial Councils are, for the most part, legislative creations, there

is reason to hope that their recommendations will receive particular consideration from the legislatures.

In all of these proposals, as we have said before, the legislator will look in vain for any attempt to promote self-interest at the expense of the public's interest. They are open and above board. They generally represent real study and much open discussion, and they afford the legislator the invaluable opportunity of starting with a carefully arrived-at result instead of beginning at the beginning. For the legislator who really understands, they furnish an invaluable aid in the solution of the overwhelming legislative problem of the session.

THE MAJESTY OF THE LAW

There is a good deal more in the construction of an imposing court house, such as that which was recently dedicated with appropriate cermonies at Jackson, Miss., than the mere acquisition of a large and convenient building. If there were not, such an occasion would hardly be worth a notice in the JOURNAL, to say nothing of the presence of the President of the American Bar Association as the guest of honor and the chief speaker.

The deeper significance of such a structure lies in the fact that it bears witness to the general sense that there is such a thing as "the Majesty of the Law," and that it is fitting that the administration of Justice should be carried out as far as possible in surroundings which symbolize its august character. And of even greater importance is the fact that such fit and dignified surroundings will react on the general public and give the law itself an added prestige.

In the effort to give "the Majesty of the Law" a symbolic architectural representation, no better start can be made than with the county court house. There is where this symbolism is most needed and will have the most real effect on actual life and attitude towards the law. There the people come in contact with its processes, and there they get the impressions which have a lasting influence on their conceptions of Law and Justice.

In the higher courts, dignified and beautiful surroundings are of course highly appropriate, but they are not such a real factor in the administration of Justice. The men who appear therein are almost exclusively those trained to the tradition of the law. They have the conception of its majesty too deeply rooted in their minds to be oblivious of it under any circumstances. The simplest detail of the judicial ritual—such, for instance, as the form of announcing the opening of the United States Supreme Court—is quite sufficient to set in motion a train of thought and sentiment. In fact, any court in itself is quite sufficient to suggest to the lawyer the vast and awe-inspiring historical background of justice as we know it today.

But the vast masses of the people, in spite of the deposit of vague notions which custom and tradition have made in their minds, know law only as they see it in action and judge of it and its processes by what they see. If it functions in mean and sordid surroundings they will, by an inevitable association of ideas, tend to regard it as more or less of a kind with those surroundings. If its environment is majestic, something of its inward majesty will also permeate their minds, and it will have a greater measure of respect and a more willing obedience from them.

This being true, it is of the first importance that the Bar, whose members are the keepers of the great tradition of the majesty of the law, should at all times exert their influence in favor of beautiful and dignified buildings for the administration of Justice. Utility is good, but there should always be something more—something that seems to express a great underlying idea to the mind of the common man. The Bar of the Capital City of Mississippi was in charge of the dedication ceremonies, and we have no doubt it had much to do with the decision of the county officers to build such an imposing structure. What they have done is what the Bar of every city and town should try its utmost to do, whenever the opportunity presents itself.

Of course there are many other things which go to make up the visible representation of the "Majesty of the Law" which confronts the public. The character and conduct of the judges, the manner in which the court is conducted, the efficiency or inefficiency of the obvious processes employed, the measure of the Bar's recognition of the real responsibility of the lawyer as a member of the court—all these have their part in the picture, and they are no doubt the most important parts. But the physical surroundings, the architectural symbolism, remains vastly significant.

REVIEW OF RECENT SUPREME COURT DECISIONS

Specific Findings Necessary to Support Charge of Confiscation Where Court Enjoins Enforcement of Order of State Commission Fixing Telephone Rates for Intrastate Service on That Ground—Order to Railroad to Install Farm Crossing Under Certain Circumstances Violates Due Process—Determination of Gross Estate Taxable Under Revenue Act of 1918—Accrual Basis for Income Tax Return Under Act of 1916—Division of Joint Freight Rates by Interstate Commerce Commission

By Edgar B. Tolman*

Public Utilities—Telephone Rates for Intrastate Service—Findings Necessary to Support Charge of Confiscation

Where a court enjoins enforcement of an order of a state commission fixing telephone rates for intrastate service, on the ground that the rates are confiscatory, it should make specific findings as to the value of the property used in intrastate business, and as to the revenues and expenses incident thereto, as well as the probable rate of return from the intrastate business on the value of the property used therein under the rates fixed, in order to give appropriate recognition to the competent governmental authorities over interstate and intrastate business.

Where the service is rendered by a separate local corporation having title to the property used, but such corporation is one among many others controlled by another corporation to give unified and nation-wide telephone service, and the controlling corporation renders various services and through a subsidiary sells equipment to the local corporation, the court should make specific findings as to the cost of such services and equipment and as to their allocation to the operating expenses of the local corporation, and as to the extent to which profits from these transactions figure in the charge of confiscation.

Smith v. Illinois Bell Telephone Co., Adv. Op. 99; Sup. Ct. Rep. Vol. 51, p. 65.

This opinion, delivered by the Chief Justice, dealt with an appeal from a decree of the district court composed of three judges which had enjoined enforcement of an order of the Illinois Commerce Commission prescribing telephone rates in Chicago, on the ground that the rates fixed were confiscatory. The order was made August 16, 1923, to be in effect October 1, 1923, and applied to four classes of coin box service, affecting a large part of the intrastate service of the Illinois Bell Telephone Company. The appellants were the Illinois Commerce Commission, the Attorney General of Illinois, and the City of Chicago.

An interlocutory injunction had been granted in December, 1923, upon condition that the telephone company should refund to its subscribers the excess charged over the rates fixed in the order, if the injunction should be dissolved. Final hearing was not had until 1929, and by the time the district court made its decision, January 31, 1930, the amount reserved for refunds exceeded $11,000,000. The court found that delay in bringing the case to final hearing was attributable to the City of Chicago. The Supreme Court was of the opinion that the effect of the order must be considered not only as of the date when made, but also during the period subsequent thereto:

> But the decree enjoining the rates speaks from its date, and the question is necessarily presented, not only whether the order of the Commission was confiscatory when made, but also as to its validity during the period that has intervened, and as to the respective rights of the complainant and its subscribers in relation to the fund thus accumulated.

The learned Chief Justice then considered the contention of the appellants that the Illinois Company was not the real plaintiff in the case. This contention was based upon findings made by the district court which were substantially as follows. Ninety-nine per cent of the stock of the Illinois Company is owned by the American Telephone & Telegraph Company, which owns about the same proportion of the stock of the Western Electric Company; the two telephone Companies cooperate in rendering long distance service under an arrangement for the division of the tolls; during the period in question the Illinois Company under an agreement paid to the American Company 4½% of its gross revenues for rent of instruments and as compensation for engineering, executive, financial and other services; much of the construction materials and equipment of the Illinois Company was purchased from the Western Electric Company, and much of its operating expense consists of payments to the latter company for apparatus and supplies. The American Company controls fifteen telephone companies, and through these and their subsidiaries, and other companies not controlled, the American Company operates a system rendering unified and nation-wide telephone service. The American Company had stated that the associated companies are specialists in local service, with local operating forces, identified and familiar with the needs of communities which they serve, and that the parent company undertakes the solution of problems common to all, so that a central authority is provided to perform general functions, with the responsibility for local affairs left to local companies.

On these facts the district court ruled against the contention that the Illinois Company is not the real plaintiff, since it remained a distinct corporate entity, furnishing service by means of property to which it held legal title.

> No ground appears for assailing this ruling. The fact that the relation of the Illinois Company to the American Company may demand close scrutiny, in dealing with certain questions which bear upon the validity of the rate order, cannot obscure the essential basis of that order,

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that is, that the Commission was imposing its requirement upon a corporate organization engaged in an intrastate public service, and, as such, amenable to a valid exercise of the Commission's authority.

The opinion then summarized the findings of the Commission relating to the elements of valuation and expenses which led the Commission to its conclusion that the rates under its consideration yielded a return of 9%, which was excessive, and to the challenged order for reductions in rates which should limit the Illinois Company's return to 7½% on the value of the property devoted by the Illinois Company to the service. A summary of the district court's findings was also made, showing the conclusions of the court that upon proper effect being given to the various elements of property and expenses the rates, as reduced by the challenged order, would produce a return of only 5½%, which was confiscatory under conditions existent in 1923.

In view of the grounds upon which the Supreme Court reversed the decree appealed from it seems unnecessary to detail these findings here. For that Court found that neither the Commission nor the statutory court had made such findings based upon a separation of interstate and intrastate property, revenues, and expenses as to enable it to determine whether the rates fixed for intrastate business were confiscatory.

In explaining the basis for its objection to the decree, the Supreme Court pointed out that the company's property in Chicago is used to render (1) exchange service, all of which is intrastate, (2) intrastate toll service over its own lines and under arrangements with companies other than the American Company, and (3) interstate toll service, which includes all toll service rendered under arrangements with the American Company. The Company introduced evidence separating intrastate and interstate business and intrastate exchange business, and while not questioning the correctness of this, the Court nevertheless made no specific findings based on a separation of the property, expenses and revenues, but determined the issue on the basis of the total Chicago property of the Company. The action of the district court in this regard was criticized in the opinion of the Chief Justice as follows:

> The court stated that this was done because that basis was less favorable to the Company than that of its total intrastate property or of its intrastate exchange property. In support of this view, the court said that according to the computations of the company, one-half of one per cent of calls originated by subscribers resulted in interstate toll calls; that 3.62 per cent of the Company's property in Chicago was used in furnishing interstate toll service, and 2.54 per cent of its property was used in furnishing intrastate toll service; that both on the reproduction cost new, as claimed by the Company, and on the original cost, the percentage of return was greater for the total Chicago business than for the total intrastate business, and that the return for the latter was greater than for the intrastate exchange business. Considering that the difference would not affect the result, the court deemed it to be more convenient to pass upon the order of the Commission without recasting the figures in order to make allowance for interstate or intrastate toll property and earnings.
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> The appellants challenge this conclusion. They insist that the American Company used in its long distance service, without properly reimbursing the Illinois Company, the Chicago local exchange plant, and other facilities of the latter company, and that the additional net income to which the Illinois Company was properly entitled in connection with the long distance service, or that suitably taking into account the value of the property used and the expenses incurred in the long distance service and not deducted from the Chicago property and expenses, would affect the result. It is apparent that this contention can not be dismissed simply on the basis of the number of interstate calls originated by subscribers of the Illinois Company in Chicago, without considering other factors of time and labor entering into the relative use. Nor can the question be disregarded by assuming a rate of return from the total Chicago business, as compared with a rate of return from the intrastate business or the intrastate exchange business, as such an assumption would beg the point in issue.
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> The separation of the intrastate and interstate property, revenues and expenses of the Company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation. In disregarding the distinction between the interstate and intrastate business of the Company, the court found it necessary to pass upon the fairness of the division of interstate tolls between the American and Illinois companies. The court held that the division was reasonable and the appellants contest this ruling. But the interstate tolls are the rates applicable to interstate commerce, and neither these interstate rates nor the division of the revenue arising from interstate rates was a matter for the determination either of the Illinois Commission or of the court in dealing with the order of that Commission. The Commission would have had no authority to impose intrastate rates, if as such they would be confiscatory, on the theory that the interstate revenue of the Company was too small and could be increased to make good the loss. The interstate service of the Illinois Company, as well as that of the American Company, is subject to the jurisdiction of the Interstate Commerce Commission, which has been empowered to pass upon the rates, charges and practices relating to that service (Interstate Commerce Act, section 1 (1) (c), (3), (5); section 15 (1); section 20 (5). In the exercise of this jurisdiction, the Interstate Commerce Commission has authority to estimate the value of the property used in the interstate service and to determine the amount of the revenues and the expenses properly attributable thereto. By section 20 (5) of the Interstate Commerce Act, that Commission is also charged with the duty of prescribing, as soon as practicable, the classes of property for which depreciation charges may properly be included in operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property. The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction, and this cannot be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority. In view of the questions presented in this case, the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed. . . As to the value of that property, and as to the revenue and expenses incident to that business, separately considered, there should be specific findings.

The remaining portions of the opinion were devoted to consideration of detailed points involved in the apportionment of the property to interstate and intrastate uses and points incident to the relation between the Illinois Company, the Western Electric Company and the American Company.

The question as to apportionment of the property to intrastate and interstate uses was raised by the appellants' objection to the Company's attributing entirely to intrastate service all the exchange property, that is, property used at the subscriber's station and from that station to the toll switchboard, or to toll trunk lines. This was done, despite the fact that the subscriber's station and other facilities of the Illinois Company are used in interstate service:

> While the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential . . . it is quite another matter to ignore altogether the actual uses to which the property is put. It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden—to what extent is a matter of controversy. We think that this subject requires further consideration, to the end that by some practical method the different uses

of the property may be recognized and the return properly attributable to the intrastate service may be ascertained accordingly.

Before taking up the points raised as to the relations of the three companies above mentioned the learned CHIEF JUSTICE observed that

> The question presented in the present case is not one of the abuse of intercorporate relations, or of domination or control affecting the integrity of the direction of the affairs of the Illinois Company, but of alleged confiscation through prescribed intrastate rates.

The first matter to be considered in this regard was the objection that the Illinois Company purchases practically all of its equipment from the Western Electric Company, and it makes payments to the American Company under its "license contract." The Commission made no findings as to the fairness of the prices paid for equipment purchased, but the district court said that it was shown that for fourteen years the average profit of the Western Company "had not been in excess of seven per cent and never above ten per cent." Commenting on the inadequacy of this finding the Supreme Court said:

> That fact has evidentiary value but the finding does not go far enough. The Western Electric Company not only manufactured apparatus for the licensees of the Bell System but engaged in other large operations and it cannot be merely assumed or conjectured that the net earnings on the entire business represent the net earnings from the sales to the Bell licensees generally or from those to the Illinois Company. Nor is the argument of the appellants answered by a mere comparison of the prices charged by the Western Electric Company to the Illinois Company with the higher prices charged by other manufacturers for comparable material, or by the Western Electric Company to independent telephone companies. The point of the appellants' contention is that the Western Electric Company, through the organization and control of the American Company, occupied a special position with particular advantages in relation to the manufacture and sale of equipment to the licensees of the Bell system, including the Illinois Company, that is, that it was virtually the manufacturing department for that system, and the question is as to the net earnings of the Western Electric Company realized in that department and the extent to which, if at all, such profit figures in the estimates upon which the charge of confiscation is predicated. We think that there should be findings upon this point.

The Supreme Court was of the opinion also that findings should be made as to the cost of services rendered by the American Company under the license contract.

> In view of the findings, both of the state commissions and of the court, we see no reason to doubt that valuable services were rendered by the American Company, but there should be specific findings by the statutory court with regard to the cost of these services to the American Company and the reasonable amount which should be allocated in this respect to the operating expenses of the intrastate business of the Illinois Company in the years covered by the decree.

The Court gave attention also to the accumulation of a $26,000,000 reserve which had accrued despite the fact that the property was found to have been maintained in at least 90% condition. Pointing out that although moneys received for past services are property of the company and that the credit balance which it constitutes cannot justify the fixing of a confiscatory rate, the learned CHIEF JUSTICE said:

> . . . It is evident that past experience is an indication of the Company's requirements for the future. The recognition of the ownership of the property represented by the reserve does not make it necessary to allow similar accumulations to go on if experience shows that these are excessive. The experience of the Illinois Company, together with a careful analysis of the results shown, under comparable conditions, by other companies which are part of the Bell system, and thus enjoy the advantage of the continuous and expert supervision of a central technical organization, should afford a sound basis for judgment as to the amount which in fairness both to public and private interest should be allowed as an annual charge for depreciation.

As to the Company's contention that the Interstate Commerce Act as amended by the Transportation Act, section 20 (5), has withdrawn from the states power over depreciation rates of telephone companies, the Court pointed out that the Interstate Commerce Commission has not yet taken final action in the matter.

> We are unable to assent to this view. As the Interstate Commerce Commission has not acted finally in the matter, we are not now called upon to consider the scope of its authority in relation to depreciation charges, but we are of the opinion that, in any event, until action has been taken which could be deemed validly to affect the amount to be charged to depreciation in connection with intrastate business so as to affect intrastate rates, the prerogative of the State to prescribe such rates, and the jurisdiction and duty of the statutory court in considering their validity to determine the amount properly allowable for depreciation in connection with the intrastate business, are not to be gainsaid. . . Accordingly, the court should make appropriate findings with respect to the amount to be allowed in this case as an annual charge for depreciation in connection with the intrastate business.

In conclusion the Court called attention to the fact that findings should have been made also as to the probable rate of return which the intrastate business would yield on the basis of the prescribed rates, rather than merely the reduction caused by those rates as applied to the entire business.

> It is evident that in the present case we are not dealing with an ordinary public utility company, but with one that is part of a large system organized for the purpose of maintaining the credit of the constituent companies and securing their efficient and economical management. The record of the Illinois Company shows that for many years it has been able to expand its business so as to meet increasing demands, to pay its operating expenses including interest on money borrowed, to pay dividends of eight per cent upon its capital stock, and to accumulate a surplus. It was found by the court that the reduction in revenue caused by the rates in question, as applied to the entire business for the year 1923, would amount to about $1,700,000, and the question is whether the loss when ascertained with respect to the intrastate business would cause confiscation under the applicable standard as above set forth in the *Bluefield* case, *supra*. In order to determine this question, the court should find the rate of return which was realized from the intrastate business and the rate of return which it is fair to conclude would have been realized from that business under the prescribed rates.
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> The conclusion reached by the court as to confiscation had particular reference to the evidence bearing upon the business of the year 1923. The court said that this finding applied "with increasing force to the succeeding years." But no findings were made as to the value of the property and the revenues and expenses in these years. A rate order which is confiscatory when made may cease to be confiscatory, or one which is valid when made may become confiscatory at a later period. . . In view of this fact, and as the disposition of the amount withheld by the Company under the conditions of the interlocutory injunction will depend on the final decree, there should be appropriate findings as to the results of the intrastate business in Chicago and the effect of the rates in question for each of the years since the date of the Commission's order.
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> In order that the necessary findings may be made, and such additional evidence as may be required for that purpose may be received, the decree is set aside and the cause is remanded to the District Court, specially constituted as provided by the statute, for further proceedings in conformity with this opinion, the restraining order entered in this suit to be continued pending further action of the District Court.

This case was argued by Messrs. George I. Haight and Benjamin F. Goldstein for the appellants and Mr. William D. Bangs for the appellee.

Railroads—Elimination of Farm Crossings at Grade

Where there is no proof that a farm crossing at grade across a railroad right-of-way is inadequate or dangerous, although an underground crossing would be more convenient for and beneficial to the owner of lands adjacent to the right-of-way, an order of the state railway commission requiring the railroad company to install an underground farm crossing constitutes a deprivation of the property of the railroad company, in violation of the due process clause of the Fourteenth Amendment.

Chicago St. Paul &c Ry. Co. v. Holmberg, Adv. Op. 97; Sup. Ct. Rep. Vol. 51, p. 56.

The railway company, the plaintiff, brought a writ of error to review a judgment of the Supreme Court of Nebraska. That Court had upheld an order of the Nebraska Railway Commission requiring the company to construct an underground cattle pass under its tracks, to connect farm lands of the defendant lying on either side of the railway right-of-way.

The state statute under which the Commission proceeded in making the order provides that where a landowner owns land on both sides of a railroad right-of-way the railroad shall provide at least one adequate means for the owner to cross the right-of-way. It also provides that such a landowner may file a complaint with the Commission alleging that the crossing is inadequate, or "unsafe and dangerous to the life and property of those who use the same"; that, after hearing, the Commission may issue such orders as it deems necessary proper and adequate; and "If circumstances warrant the Commission may require overhead, underground or grade crossings and require wing fences at underground crossings or may require existing crossings to be relocated so as to be safe to those who use them." Provision is also made that the owner shall bear one-half of the expense, over $700, for special crossings.

For fifteen years a surface crossing had been maintained across the tracks of the company extending through the lands of the defendant. The only ground of inadequacy suggested was that the crossing could not be reached without passing through the defendants' cultivated lands, and that to avoid this, cattle had to be taken a quarter of a mile on a public highway and across the railway tracks, from pasture to water supply. It was conceded on the argument that the railway line is a branch line over which but four trains pass daily.

The state court proceeded upon the theory that, whether the statutory obligation to maintain a farm crossing had or had not been altered since the right-of-way was acquired over the defendant's land, the State, nevertheless, in the exercise of its police power, might make a further definition of adequacy, and supported the order on the ground that the state, in the exercise of such power, could "eliminate the perils of grade crossings."

Holding that this was insufficient to sustain the order, the Supreme Court reversed the judgment in an opinion by MR. JUSTICE STONE. The basis for the Court's reversal of the judgment was chiefly that there was no showing that the existing crossing was dangerous, and that the effect of the order was merely to afford a more convenient crossing for the landowner, constituting a deprivation of the railway's property contrary to the due process clause of the Fourteenth Amendment:

> There is no occasion for us to consider how far, if at all, the state's power to remove the dangers of public grade crossings . . . extends to private farm crossings when unsafe to the traveling public or individual users. The Nebraska statute has delegated to the State Railway Commission authority to order farm crossings underground because either inadequate or dangerous, if circumstances warrant. But there is nothing in this record to suggest that the order of the Commission was either asked or granted as a safety measure. The Commission did not find that the crossing was dangerous either to the public, the litigants, or their property. Neither did it find that this crossing was in anywise different from the usual farm crossing at grade. True, there was testimony that cattle passing over the crossing needed to be attended and controlled to prevent injury to them by trains. But this was no more true of that crossing than of surface farm crossings in general. The case is one of a single track branch line. The track is straight and it was conceded on argument before this Court that there were only four trains a day. While there are bare assertions in the testimony that the private crossing was dangerous, there was no evidence of any danger beyond that which would attend the use of any farm crossing. Neither the Commission nor the state court regarded the statute as condemning all such crossings, doubtless because the statute distinctly includes that type of crossing among those which it authorizes the Commission to require, its words being, "the Commission may require overhead, underground or grade crossings" as the circumstances may warrant. It is plain that the Commission proceeded upon the assumption that the statute authorized it to compel plaintiff to establish the underground pass for the convenience and benefit of defendant in the use of his own property, and that that alone was the ground and purpose of the order. The application thus given to the statute deprives plaintiff of property for the private use and benefit of defendant, and is a taking of property without due process of law, forbidden by the Fourteenth Amendment.

The case was argued by Mr. Wymer Dressler for the plaintiff in error and by Messrs. O. S. Spillman and Hugh LaMaster for the defendant in error.

Taxation—Federal Estate Tax

In determining the value of the gross estate of a decedent in computation of the estate tax imposed by the Revenue Act of 1918, only such property is to be included as is subject both to payment of his debts and to the expenses of administration.

In those states where real estate passes to heirs and devisees free from liability for costs of administration such real estate can not be included in the determination of the value of his gross estate under that section.

Crooks v. Harrelson, Adv. Op. 50; Sup. Ct. Rep. Vol. 51, p. 49.

In this opinion, by MR. JUSTICE SUTHERLAND, the Court considered whether certain property of a decedent should be included in determining his gross estate taxable under Section 402 of the Revenue Act of 1918. That section provides that in determining the value of the gross estate all property real or personal shall be included,

> "(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate";

The decedent resided in Missouri and died leaving real property there, valued at $269,000, in addition to other property, which the Commission included as part of the gross estate in computing the tax. Under the law of Missouri real estate is not subject to the expense of administration, and the tax imposed in consequence of including the real estate having been paid under protest, the respondents sued to recover the amount thereof. The district court and the circuit court of appeals allowed recovery, and on certiorari to the Supreme Court the judgment was affirmed. In reaching the conclusion that the real estate in question was not to be included in the gross estate, MR. JUSTICE

SUTHERLAND pointed out that a distinct and separate requirement laid down in the statute is that property to be included must be subject to payment of expenses of administration.

> The meaning of the provision in question, considered by itself, does not seem to us to be doubtful. The value of the interest of the decedent is not to be included unless it "is subject to the payment of the charges against his estate *and* the expenses of its administration"—not one or the other, but both. We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word "and" was used otherwise than in its ordinary sense; and to construe the clause as though it said, "to the payment of charges and expenses, *or either of them*," as petitioner seems to contend, would be to add a material element to the requirement, and thereby to create, not to expound, a provision of law. Nor will it do to say that the words, "*charges* against his estate," include expenses of administration, for plainly they are different and distinct things, generally so classified in the settlement of estates of decedents, and so regarded by Congress, as evidenced by the discriminating terms of the statute.

In support of its conclusion the Court cited *United States v. Field*, 255 U. S. 257, which involved property passing under a general power of appointment by will. The Court was of opinion that such property was not subject to distribution as part of the estate of the party vested with the power of appointment, and stated that the various conditions are expressed conjunctively in the statute and cannot be read as if expressed disjunctively.

> It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this court in *Holy Trinity Church v. United States*, 143 U. S. 457; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. . . And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. . .
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> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. . . It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.

The Court, pointed out further that the statute involved was a taxing statute, which is not to be extended by implication beyond the clear import of the words used in it.

A further contention considered was that advanced by the petitioner that the real estate was properly included because the executor may sell real estate to pay debts of the estate or legacies, and is entitled to a commission on the proceeds of the sale. But the argument was deemed unsound:

> It is conceded by the petitioner, as it must be, that at common law real estate cannot be sold to pay expenses of administration, and that this rule of the common law is in effect in Missouri unless modified by statute. It is further conceded that there is no statute which permits real estate to be sold merely to pay such expenses. One contention, however, is that an executor or administrator may be authorized by the proper court to sell real estate to pay debts and legacies if the personal estate is insufficient; and that upon such sale the executor or administrator is entitled to a commission on the proceeds of the sale, which takes priority over the payment of debts against the estate. As to this it is sufficient to say, as the court below said, that this commission is not an expense of administration, but an expense incidental to the sale of the lands.

In conclusion the Court stated that *Steedman v. United States*, 63 C. Cls. 226, and *Bartlett v. Commissioner*, 16 B. T. A. 811, are disapproved so far as they are in conflict with the conclusions in this case.

The case was argued by Mr. Claude R. Branch for the petitioner and by Mr. Frank S. Bright for the respondents.

Taxation—Federal Income and Profits Tax— Returns on Accrual Receipts and Disbursements Basis

Under the Revenue Act of 1916 an income tax return based upon inventories, and treating accounts receivable and accounts payable as receipts and disbursements respectively, is properly regarded as on an accrual basis, and a deduction for the tax imposed on profits derived from business done in 1916 is properly made in 1916, rather than in 1917, although the tax was not paid until 1917 and although the taxpayer characterizes the return as on the basis of actual receipts and disbursements.

The Aluminum Castings Co. v. Routzahn, Adv. Op. p. 36; Sup. Ct. Rep. Vol. 51, p. 11.

The petitioner, a manufacturing company, sued to recover income and excess profits taxes assessed and paid for the year 1917. The right to recovery was asserted on the theory that a munitions tax imposed under Title III of the Revenue Act of 1916, became due and was paid in 1917, and was accordingly correctly deducted from gross income in the petitioner's tax return for that year. The Commission ruled otherwise, and deducted the tax from gross income on business done 1916, the year of its accrual and collected an income and excess profits tax for 1917, correspondingly increased. The district court and the circuit court of appeals sustained the Commissioner on the authority of *United States v. Anderson*, 269 U. S. 422, and on certiorari judgment against the taxpayer was affirmed by the Supreme Court in an opinion by MR. JUSTICE STONE.

The Act imposes a tax on net income and profits during the calendar year, after deducting expenses, interest and taxes paid, and losses sustained during the year. Section 13 (d), however, gives the taxpayer the option of making a return on a basis other than that of actual receipts and disbursements, if accounts are kept on another basis, unless it does not clearly reflect income.

The petitioner's returns for 1916 and 1917 stated that they were made on the basis of actual receipts and disbursements, but in 1917 a qualification was added to the effect that "Bills and accounts payable and receivable are treated as receipts and disbursements." In both returns, bills and accounts payable and receivable, were treated as actual receipts and disbursements and were based on inventories taken at the beginning and end of the taxable year. The munitions tax de-

ducted in the 1917 return first appeared on the books in 1917.

The taxpayer contended that statutes and Treasury Regulations supplementary thereto in effect prior to the Act of 1916 authorized returns such as those made by it in 1916 and 1917, and the Section 13 (d) of the latter Act, merely giving an option not availed of here, did not alter their right to make the returns involved here. The Court rejected this, as being in substance the contention made in *United States v. Anderson*, and said that the facts shown justified the finding that the petitioner's books were kept on an accrual basis. MR. JUSTICE STONE said:

> Section 12 (a) of the 1916 Act, like its prototypes in the earlier legislation, deals only with the deduction from gross income of amounts paid out or losses sustained. None of them, in terms, permitted the deduction of accounts payable or made any provision for the use of inventories in computing net income. Experience demonstrating that income derived from merchandising and manufacturing businesses could not be computed on the basis of receipts and disbursements alone, treasury regulations were promulgated requiring the use of inventories in proper cases, and permitting the deduction of accounts payable when accounts receivable were brought into the income account. . .
>
> But this action of the Department, born of necessity in order to arrive at the income of certain businesses, was neither a classification nor an irrevocable designation of items receivable and payable as cash receipts and disbursements. Although the regulations supplemented the provisions of the statute by providing for a different method of computing income, they did not alter the meaning of its words, or preclude acceptance of them at their face value when reenacted in a new legislative setting. Classification took place when sec. 13 (d) was substituted for existing treasury regulations and broadly authorized returns under it by taxpayers "keeping accounts upon any basis other than that of actual receipts and disbursements," a phrase which, in the light of the legislative history, plainly indicates that the returns contemplated by sec. 13 (d) were to be dealt with as a separate class, distinct from those based on actual receipts and disbursements alone described by sec. 12 (a).
>
> By these sections the filing of a return under sec. 13 (d), where the taxpayer is able to comply with its requirements, is optional if he is also able to prepare a return on the basis of actual receipts and disbursements which reflects true income. But "notwithstanding the option given taxpayers, it is the purpose of the Act to require returns that clearly reflect taxable income." . . By sec. 13 (b) of the 1916 Act, which was new, the return in every case is required to state such data as are "appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title." It follows that the return must be filed on the accrual basis under sec. 13 (d), where true income cannot be arrived at on the basis of actual receipts and disbursements. . . Any other construction of sec. 12 (a) and 13 (d) would disregard the requirement of sec. 13 (b) and the dominating purpose of the Act, by enabling the taxpayer to file a return which did not reflect true income. . . It was in recognition of this, and in compliance with sec. 13 (b), that Treasury Decision 2433, Jan. 8, 1917, provided with respect to returns made under sec. 12 (a) and 13 (d):
>
> "This ruling contemplates that the income and authorized deductions shall be computed and accounted for on the same basis and that the same practice shall be consistently followed year after year."
>
> This ruling antedated petitioner's 1916 and 1917 returns, and obviously gross income and deductions in its returns were not "accounted for on the same basis." Its income for 1917 could not be ascertained by deducting from gross income, including receivables, some items of cost and expense, attributable to the production of 1917 income, which accrued but were not paid in that year, and the munitions tax, which was paid in 1917, but which accrued and was attributable to the production of income in 1916.
>
> Petitioner, relying on the declarations in its returns that they were made on the basis of actual receipts and disbursements, contends that for that reason they must be deemed made under sec. 12 (a) and not under sec. 13 (d). But whether a return is made on the accrual basis, or on that of actual receipts and disbursements, is not determined by the label which the taxpayer chooses to place upon it. The use of inventories, and the inclusion in the returns of accrual items of receipts and disbursements appearing on petitioner's books, indicate the general and controlling character of the account . . . and support the finding of the trial court that books and returns were on the accrual basis. The record does not disclose that petitioner offered to make a return for 1917 on the basis of actual receipts and disbursements, or that it could have done so. It was, therefore, competent for the Commissioner to correct the return for 1917, to conform it to the system of accounting in fact adopted, by excluding from it the munitions tax which had accrued in 1916, whether appearing on the books for that year or not.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissented. MR. JUSTICE SUTHERLAND stated that he had not agreed with the Anderson case, but felt bound to follow it since the majority of the Court adhered to it, and concurred here solely on that ground. MR. JUSTICE ROBERTS concurred in the view expressed by MR. JUSTICE SUTHERLAND.

The case was argued by Mr. John T. Scott for the petitioner and by Mr. Claude R. Branch for the respondent.

Interstate Commerce Commission—Division of Joint Rates

In prescribing the divisions of joint freight rates among carriers, the Interstate Commerce Commission is required to give consideration to the factors enumerated in Section 15 (b) of the Interstate Commerce Act, with reference to each carrier participating in the divisions, but may do so upon evidence which it reasonably deems typical of groups of carriers and of sufficient probative weight to justify the necessary order and findings in respect of each rate, without, under all circumstances, taking specific evidence as to each rate of every carrier.

In giving consideration to the rates of return of groups of carriers participating in the divisions as required by the statute, it is not necessary that approximate similarity in the rates of return shall exist between the carriers in each group, but rather that there shall exist an estimated general mean of conditions affecting the carriers constituting each group.

Beaumont, Sour Lake & Western Ry. Co. v. United States, Adv. Op. p. 41; Sup. Ct. Rep. Vol. 51, p. 1.

This opinion, by MR. JUSTICE BUTLER, disposed of two appeals from a decree of the district court, three judges sitting, which had sustained an order of the Interstate Commerce Commission prescribing divisions of freight rates between certain groups of carriers. One appeal was taken from the decree by carriers attacking the order, and the other by the Commission and the United States from an order of the court staying enforcement of the rate order upon the posting of a bond by the appellants. But on appeal the decree and the order were both affirmed by the Supreme Court.

The Commission's order prescribed divisions of joint rates applicable to certain freight traffic moving via western lines from southwestern territory to eastern territory. The order was the result of an investigation, made by the Commission on its own motion, and prescribed an adjustment of divisions favorable to the carriers in western trunk line territory.

In its report of the case the Commission made, among others, the following findings:

The divisions in effect were established about 35 years ago, and conform to no logical or consistent

basis. Transportation conditions have changed materially since most of the divisions were established, benefiting southwestern lines more than others, with a present trend in favor of the southwestern lines. As regards density of traffic, conditions are more favorable in western trunk line territory, though conditions in such territory vary, being, in general, progressively less favorable from east to west. The difference in conditions is reflected in the difference in rates in the two territories, but determination could not be made from the record as to what the average difference is, though it appeared to be greater than the difference in average transportation conditions, particularly as regards rates in the two territories constructed upon somewhat different theories. The cost of operation, including a fair return on investment, probably does not average as much as 20% higher in southwestern territory than in the other group. On the whole, the financial condition of the western group is not as good as that of the southwestern group.

The Commission's report also states as follows:

> "The divisions here in issue are dealt with of record on a group basis. They are, in other words, the divisions 'in the aggregate' north and south of the gateways named, and no question is raised with respect to the divisions of individual carriers. In our opinion the divisions in issue are not just, reasonable, and equitable. Many of them are unjust to complainants, and some of them are unjust to defendants. To cure their defects, they must be readjusted upon a consistent basis which will as nearly as practicable reflect, in the light of all the facts of record, the differing conditions in the two territories."

After the making of the report referred to and of a further report on rehearing, the order prescribing the divisions complained of was issued.

> As to the joint rates in question, it directs that the "just, reasonable and equitable divisions in the aggregate north and south of said gateways" shall be made in accordance with the findings and formulas above mentioned. Divisions made on the bases prescribed, while decreasing the western trunk lines' shares on some shipments, will increase them on many more, and it is estimated that the order will operate to give those lines about $3,000,000 annually, over and above what would be yielded to them under existing divisions. This is much less than one per cent of the total freight operating revenues of the southwestern carriers.

The appellants attacked the order on the ground that the Commission is required to determine the divisions of each carrier upon a consideration of its own needs and rights and is not authorized to make an order based on group conditions or on average conditions in the group.

After stating the case and the point of attack on the order MR. JUSTICE BUTLER turned to provisions of the Interstate Commerce Act relating to the Commission's power over the subject. Section 15 (6) provides that whenever the Commission is of the opinion, after a hearing, that the divisions are unjust, unreasonable, inequitable or unduly preferential or prejudicial it may prescribe reasonable and equitable divisions. It also provides that,

> "In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

In this connection the Court pointed out that these requirements are to be considered having regard to the Commission's duty to establish rates, under Section 15a (2), "so that carriers as a whole in each of such rate groups or territories as the Commission may from time to time designate" will be able to earn as nearly as may be a fair return on the aggregate of their operating property under honest, efficient and economical management.

> The Commission by sec. 15 (6) is required to consider the condition of each carrier and to determine whether the division of each joint rate is unreasonable or otherwise repugnant to the specified standards and what division will for the future be just, reasonable and equitable. *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274, 291. The Commission may not change an existing division unless it finds that division unjust or unreasonable. *Brimstone R. R. Co. v. United States*, 276 U. S. 104, 115. Cf. *Interstate Commerce Commission v. Louisville & Nashville R. R.* 227 U. S. 88, 92. But it need not under all circumstances take specific evidence as to each rate of every carrier. When considering divisions of numerous joint rates applicable to traffic passing through gateways between different territories the Commission may make the required determinations and establish the bases for divisions between groups of carriers in the respective territories upon evidence which it reasonably may deem typical and to have sufficient probative weight to justify the necessary findings and the order in respect of each rate. That is to say, such typical evidence may sufficiently disclose the facts necessary to enable the Commission duly to consider the divisions of each joint rate to be received by every carrier. *New England Divisions Case*, 261 U. S. 184, 191, 196, 199, *Brimstone R. R. Co. v. United States, supra*, 116.

Discussion as to the application of the statutory requirements here was concluded with the observation that the evidence was sufficient to show the facts specified in section 15 (6) and that the mere fact that the carriers and divisions were dealt with on a group basis did not show a failure to consider each carrier and each rate, or to consider the facts specified in the statute.

But the appellants urged also that the order was based upon a comparison of average conditions of widely dissimilar carriers in each group, so that the divisions ordered are so unjust and arbitrary as to exceed the Commission's power. In support of this the appellants pointed to the record showing in each group carriers that earn little or no return, and others that earn relatively high returns, so that the prescribed divisions will operate in some cases to transfer substantial sums from weak carriers in southwestern territory to prosperous ones in western territory. Upon examination of the record Mr. Justice Butler recognized the force of this contention and said that the order could not be sustained on the facts if approximate similarity between carriers in each group is essential. But it was concluded that the statute does not require approximate similarity.

> "Average" as used in the report manifestly is not intended to refer to an arithmetical calculation, the quotient of a sum divided by the number of its terms. It is rather to be understood as an estimated general mean of the conditions of the several carriers constituting each group arrived at by the exercise of judgment upon the facts shown by the evidence. The reports satisfactorily show that the findings as to average group conditions taken as a whole are sustained by substantial and persuasive evidence. But they do not deal with the important question whether, under the evidence and having regard to the wide dissimilarities between rates of return earned by individual carriers in each territory, the use of the average or group basis is justified and whether it will produce unreasonable divisions. The general statements

in the reports to the effect that the Commission in reaching its conclusions considered all the pertinent evidence add nothing to the prima facie presumption that generally attends determinations of the Commission.

The learned Justice then stated the conclusions reached from an examination of the record in support of the district court's decision that the order was valid. In this statement it was pointed out that while the Commission must consider the financial condition of the carriers it need not make that the only test; that it had not taken average rates of returns as the principal factor in making the divisions; that operating and other conditions had been shown and presumably considered in using group conditions; that there was no showing that the order will require service at less than cost; and that it is impossible to fix divisions yielding the same rate of profit to each carrier on every commodity. Attention was called also to the fact that the average cost of service was apparently given much weight and that for aught that appears carriers having little or no return on their total business may move the traffic in question at low costs and realize a profit on the latter. Moreover, recognition appeared to have been given to the fact that divisions based on mileage are the same as those based on relative costs, other things being equal. For the Commission found that the existing divisions gave southwestern lines over 30% more than their mileage prorate and the order leaves them substantially more than would divisions on that basis. The trend of conditions favorable to the southwestern lines as well as the greater density making for lower costs in western territory seemed to have been taken into account.

A further contention made, that the order was confiscatory, was also rejected as without foundation in the record.

The point taken by the Commission in its cross appeal that it was error to stay the order, was also rejected by the Court. As to this MR. JUSTICE BUTLER stated that there was no abuse of discretion on the part of the district court, since the parties benefitting by the order were protected by bond, and unlike the situation in *Virginian Railway v. United States*, postponement of the effective date would inflict no loss on the public.

The case was argued by Messrs. Frank H. Moore and Samuel W. Moore for appellants in No. 44 and appellees in No. 45, by Mr. Edward M. Reidy for the United States and the Interstate Commerce Commissions, and by Mr. Frank H. Towner for appellees in No. 44 and appellants in No. 45.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

Law and the Modern Mind. By Jerome Frank, with an introduction by Judge Julian W. Mack. 1930. New York: Brentano's. Pp. xvii, 362.—*Law and the Modern Mind* is the most provocative stimulus to thinking on fundamental legal problems that has appeared in the Anglo-American literature of jurisprudence since Dean Pound's *Spirit of the Common Law.* Mr. Frank, himself a practicing lawyer, has tackled these problems in a thoroughly practical way. The significance of precedent, the relation of opinions to decisions, the problem of rule and discretion, the nature of law, these and a dozen other foci of legal controversy are approached with a persuasive awareness of the factual context in which these problems assume real significance. A lively imagination, a remarkable facility for coining suggestive expressions, and a speaking acquaintance with the principal works of his contemporaries lend Mr. Frank's volume a dash and sparkle rather shocking to one who associates jurisprudence with the sedate commentaries on Austin and Maine which appear in England about once a year. All this is not to suggest that *Law and the Modern Mind* can be swallowed and digested as it comes from the press. It must be washed and peeled, and there are unripe and over-ripe parts to cut out; it must be boiled and mashed and seasoned with a good deal of salt before it can safely be entrusted to a moderately sensitive legal stomach.

Frank's fundamental thesis is that the law is not and ought not to be certain and predictable and that those who think otherwise are simply infantile. Down through the ages, we are told, men have associated law with something eternal which persists through changes of circumstance and which somehow lies deeper in the nature of the universe than the ephemeral decisions of judges and juries in particular cases. When counsel argue, they assume that there is an already existent rule of law which makes it the plain duty of the court to decide in their respective favors. The judge in writing his opinion will reaffirm one of these alleged duties to the past. Even legal philosophers who know that judges make law, e.g., Demogue, Pound, Wurzel, think it well to maintain this picture of the court finding pre-established law, lest judges lose a sense of responsibility and laymen a sense of security. So we go ahead and define law as something fixed and discoverable, whether it be the perfection of reason, or the dictates of God, or the voice of the Zeitgeist, or the command of the sovereign, or the rules that have been laid down by courts. Then we

cover up the uncertainties in our legal "system" by calling the work of juries a decision of *facts*, by refusing to look behind the distorted view of the facts which the judicial opinion generally presents, by putting our legal rules into terms that sound the same but mean quite different things in different cases, and by calling decisions that do not fit our wholly unofficial patterns *wrong* (as if this somehow made them vanish). How is it, asks Frank, that lawyers and jurists, a class distinguished for superior mentality, should believe or want to believe in this strange mythology?

The answer to this question our author finds in the fact that all lawyers, jurists, and laymen were, before birth, rather more adequately provided for in the way of food and lodging than they have been since, that most of them after birth discovered fathers stronger and wiser than themselves, and that in later years a yearning for primeval security, comfort, and dependence brings about an emotional and irrational attitude towards the Law as a Father-Substitute, wise and powerful with superhuman wisdom and power, promising to those who submit to It security from the hazards of life. The thesis is, of course, Freudian, and its elaboration is definitely reminiscent of Krutch's *Modern Temper*. Like the metaphysician who finds behind the passing flux of phenomena an eternal and harmonious realm of Platonic essences, like the orthodox religionist, the believer in legal certainty is a sort of glorified Mammy-singer yearning for a Kentucky home which no longer exists.

In all this Mr. Frank has missed a large part of human wisdom. Granted that the actual certainty of the legal order has often been greatly overestimated, granted too that certainty is often purchased at the expense of "justice in the particular case," granted as well that the human demand for security has deep and sub-rational roots in childhood and possibly in pre-natal existence, it does not follow that this demand is undeserving of legal protection. Uncertainty, as our author insists, is adventure, but adventure is hunger and thirst and heart-ache and death. Civilization rests upon a vast, intricate complex of expectations and prophecies, and only the predictable behavior of those bodies to which society has entrusted its collectivized physical force can put iron into that scaffolding of hopes and reliances. Even from the standpoint of "justice in the particular case," uniformity of decision is the only practical guarantee against the tyrannical exercise of prejudice which our author is quick to recognize as the outstanding defect of the jury but which is strangely missing from the picture he draws of judicial discretion freed from its bonds to the past.

The questions which Mr. Frank has put to us are not as simple as the answers he has offered. Granted that much nonsense has been uttered in the name of legal logic, eternal principles, and "law apart from decisions," there is, as our author frequently recognizes in the cool retrospection of a footnote, *something* beyond decisions, in terms of which we can criticize decisions. There is something to which the judicial "hunch" should conform; there are some patterns to which it does conform.

A cavalier disdain for the compromises between certainty and sensitiveness which have appealed to legal philosophers like Pound and Cardozo lends a picturesque clarity to our author's assaults upon "rules of law," "legal scholasticism," "judicial somnambulism," and "Bealism." But an insistence upon the omnipresence of uncertainty and the universal value of discretion leaves Mr. Frank in a fort which he has ably demolished. It is ancient wisdom that only an absolutist can deny *all* absolutes. And he will certainly be wrong.

New York City. FELIX S. COHEN.

Problems of the German-American Claims Commission, by Wilhelm Kiesselbach. 1930. Washington: Carnegie Endowment for International Peace. This is not the least valuable of the many valuable books published by the Carnegie Endowment.

Dr. Kiesselbach was the German commissioner on the Mixed Claims Commission at Washington, following the Great War; in 1927 he published at Mannheim the work of which this is a translation,—a faultless translation, in which the somewhat ponderous style of the original has been lightened.

The author does not deal with decisions in particular cases; these will be found in the Governmental *Mixed Claims Commission*, published at Washington; he considers and discusses the problems which called for solution and the methods of meeting them, making manifest the disappointment of the German, met with conceptions of law and right wholly foreign to him.

It is satisfactory to see that he pays tribute to the "upright spirit of the Umpire, Judge Parker, who was ever animated by a meticulous striving for impartiality."

It is quite impossible in a short review to do more than hint at the many important discussions and decisions given us; a few may be mentioned.

The very important conclusion that there was no new law, no new legal basis, for the American claims made by the Treaty of Versailles or that of Berlin, was early arrived at; but the traditional method of determining the claims severally without reference to each other was not followed; and rarely was any witness or party heard by the Commission.

The legal nature of the claims based upon a total national reparation was repudiated by the American government, who made the individual the person to be considered. This was, of course, carrying out the American idea of "government of the people, by the people, for the people,"—a modern adaptation of the old Teutonic conception of the State existing for the individual, in contrast with that of Rome, that the individual exists for the State. The discussion on this matter is very interesting to the philosophical student of institutions.

The extent of liability for death was determined differently from the English method of arriving at an average amount, which was claimed in every case. The actual damages for "mental suffering, as also for moral or spiritual prejudice as a result of losing the care of husband or parent, estimated in dollars and cents," was wholly foreign to German ideas of law. The principle of what we call "Lord Campbell's Act" did not appeal to the German; nor did the claims of life insurance companies for "premature deaths." The marine insurance companies were a trouble, too.

As to compensation for damage to property, the Germans contended that it was not right that the American charterer of the Norwegian vessel,

Vinland, sunk by German submarines, should be paid for the loss of his profits; but, once more, the American doctrine of private right, as distinguished from the claim of a nation, proved too much for them.

Corporate claims were one of the *cruces* to be faced; and many more questions of equal interest and importance were dealt with. While no new law was pronounced, it is impossible not to recognize that the problems of this Commission and their solution must be of great value in all such proceedings in the future. We should, I think, thank the Carnegie Endowment for this addition to our available sources of international law. That the book is admirably printed on good paper, well-bound, with proof-reading well done, may be considered a commonplace with those who are favored with the perusal of its publications.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto.

The Case Method of Studying Law, by Jacob Henry Landman. 1930. New York: G. A. Jennings Co. Pp. 108. This critique of the case method of studying law is a remarkable piece of reasoning on the old subject of discussion among American law teachers. Of course it cannot be dealt with exhaustively in a short book review. I must limit myself to some descriptive remarks. When I wrote seventeen years ago on this problem in the Bulletin of the Carnegie Foundation for the Advancement of Teaching, I insisted that the Langdellian method of teaching law is not a "scientific" one in the sense in which this word is understood in America, namely, designating physical science alone. Mr. Landman yet complains of the case method as not being a sufficiently "scientific" method in this sense. This contrast shows the fundamental difference between my own and the author's general viewpoint. I still adhere to my opinion that the case method is just the truly scientific method for teaching American law because it corresponds fully with the nature of historic law as the object of a thoroughly scientific study. Phenomena of nature are studied scientifically by the methods of observation of natural facts, both those produced by organic life and by inorganic "matter." Another method of studying nature is to experiment on those objects and ultimately formulate "laws" of physical life. We do all that by applying the experience of our senses as the basic element of our reasoning. Of course the preponderantly inductive method does not at all exclude application of the process of the deductive method too. The importance of mathematical operations of the mind for the study of physics and astronomy shows that evidently.

Law is not a part of nature in the physical sense. It is a social product, and as such it is a system of rules. To understand these rules fully it is necessary to study their application by lawyers in the courts of justice. By the study of cases, mastery of the principles of law is obtained in the best manner. The elaboration of those principles which connect single rules and put them in order is the real basis of what we call the science of law. In order to understand those principles produced by most multifarious processes of centuries of national life, it is indispensable to grasp and to understand the history of those rules, and the principles they reveal. Law is an organic growth, and not at all a rationalized mechanism or machine constructed by an intellectually superior power outside of the historic, every-day life of the people. Whether it is judicial law laid down by judges trying and deciding single cases, or whether it is statutory law enacted by legislation, those rules always are liable to become "historic"; for life, in which they originate, continually flows, continually varies and produces new economic, social, individual phenomena, produces new necessities of human intercourse, changes, ideas and emotions in the psychology of single men, of social groups, and of the nation as a whole. In nations like the American, where English common law forms the indestructible basis of national life, the latter finds expression in the interminable series of reports of cases adjudicated in the courts of law. These reports are, as it were, the "living matter" from which the student of law has to learn both the substance of law and the specific ways of legal thinking. He attains this result best by the so-called case method as it is systematically applied by the modern academic law schools of American universities with the help of the case book.

There is no doubt that case books can be arranged in varying manners. It is clear that since Langdell's first case book this specific branch of legal literature has undergone many changes. It is unavoidable, and at the same time very useful, that the individuality of the law teacher produces such changes, and it is clear that the spirit of reform should not be "tabooed" in the orbit of legal education, not in the least.

Certainly criticisms can be raised against any case books being used, and certainly there are shortcomings to be found in them that should and could be redressed. But this does not tell against the integral pedagogical value of the case book as the great instrument of law-teaching in law schools. The problem of how to use lectures as an auxiliary method in teaching law is, in my opinion, well worth consideration by the modern American law teacher. I agree with the author in his opinion that both at the beginning and at the end of a three years' course in legal education well-elaborated encyclopaedic lectures surveying the total body of law, or great branches of the same, would do much to enhance the pedagogical value of the case book in studying law. Such lectures would help students to see the systematic connection of the single branches or institutes of law. But the "problem method" offered by Mr. Landman as a substitute for the case method seems to me a truly unscientific way of teaching law. It rests on the erroneous compounding of the task of the law student with that of a practising lawyer or a writer on a legal problem or case. It seems to me that by such a method only a very superficial dealing with law problems could be attained, but never any true knowledge of law. Such a method would produce cheap journalism on law, instead of legal knowledge.

JOSEPH REDLICH.

Harvard Law School.

Tenure of Office Under the Constitution: A Study in Law and Public Policy, by James Hart. 1930. Baltimore: The Johns Hopkins Press, pp. ix, 384. This volume deals with an interesting and important subject. Discretionary powers are, and must continue

to be, vested in many federal officers and commissions, to be exercised free from control by the president. If, under the Myers case, the president has an unlimited power of removal, he may through the exercise or threatened exercise of such power control the discretion vested in such officers, and there is much merit in the author's view that the Myers case should not be construed to forbid congressional regulation of tenure of office and congressional limitations upon the power of removal in such cases.

The volume under review would possess greater merit if it had limited itself to the subject it professes to discuss. This would have reduced it to much smaller compass. The volume is typical of a new style of academic writing. The author gathers from other fields a few new terms and makes a show of erudition by stating simple matters in a manner difficult to understand. He violates the principle that anyone who has mastered his subject can and should present a technical problem simply and clearly enough for the layman to understand it. The author says that the permanent contribution of his work lies in the fact that "it illustrates a point of view which is useful both in the attack upon a political problem, and in a critical analysis of the judicial process." The reviewer trusts that the author's method of treatment will have few imitators in the political and legal fields.

The author places an undue burden upon the reader, who is notified at the outset that "The point of view herein represented cannot be appreciated by one who is not somewhat familiar with the ideas set forth in John Dewey's "*Essays in Experimental Logic*" (p. 4). The reader must also have "some understanding of the science of symbolism" (p. 5), and must accept the "relativity of truth" (p. 5); and in addition must understand that "scientific 'truth' is truth in the empirical sense (E-sense), logical and mathematical 'truth' is truth in the deductive sense (D-sense)."

Chicago. WALTER F. DODD.

Shakespeare and His Legal Problems, by George W. Keeton, of Gray's Inn, with a foreword by the Rt. Hon. Lord Darling. 1930. London: A. & C. Black. This is a pleasantly written book by a competent authority, and, as Lord Darling says in his Foreword, it is to be commended "to all who may incline to learn something of the law as Shakespeare knew it and are curious regarding the use he made of legal procedure in his plays."

Beginning with the illegitimacy of Falconbridge, he points out the original very extended jurisdiction of the *Magnum Concilium,* that of the *Curia Regis,* and the force of the none-too-elegant remark of Judge Richill in 7 H.4.

That Shylock v. Antonio contains bad law, we all knew; but "to Elizabethans the trial scene must have been a very real thing, and, if we find the procedure a little stilted, we must not blame Shakespeare."

Passing over the trial of Buckingham in *Henry VIII,* we come to the absurd but interesting Shallow, J. P., who may or may not be Sir Thomas Lucy,—for more than Lucys had "louses" on their coats of arms; to the delightful Dogberry, and Seacoal, who could actually read and write,—but then that was a gift that "comes by nature"—and to the gravediggers in *Hamlet.* Here, curiously enough, the author fails to refer to the famous Hales v. Petit, 2 & 3 Elizabeth, Plowden, 253.

In the chapter *International Law in Shakespeare,* we are reminded that *vixere fortes ante Agamemnona,* and Gentilis preceded Grotius in treating of international law.

Master Caper and Master Rash in a Viennese prison for debt remind us of the common law way of getting a debt paid, that is, to imprison the debtor so that he can not make any money to pay it with.

The many disquisitions as to title to the Crown are of nothing but antiquarian interest, since even in England the King, though he is forced to call himself "King by the Grace of God," quite recognizes that he is King by grace of an Act of Parliament, and the authority which gave can take away. In Shakespeare's time, the King honestly thought he was King by the Grace of God; and acted the Ruler accordingly. One almost shudders when he thinks of what Queen Elizabeth or her much-married father would think of the modern conception of the Kingship.

The painful story of Hermione in *The Winter's Tale,* we may pass over, and come to the refreshing story of Lord Chief Justice Gascoigne and Prince Hal. This is, of course, taken from Hall's *Chronicle,* and *may* be true; *quien sabe?*

In the chapter on *Richard II and the Trial of the Earl of Essex,* we are reminded that Richard II was the last King of England whose title to the Crown rested solely on descent, *alias,* in the usual language, "By the Grace of God."

Trial by Battel, which was not abolished in law, though obsolete in practice, until the last century—it never made its appearance in Canada, nor, so far as I can find, elsewhere on this Continent—was well known in the times in which Shakespeare lived.

Was Henry Garnet, the Jesuit Superior, the "Equivocator," who "could swear in both the scales against either side, who committed treason enough for God's sake, yet could equivocate to heaven," as the Porter says in *Macbeth?* and how does the trial of the Duchess of Gloucester for witchcraft in *Henry VI* differ from that of the humble folk in Salem, Massachusetts?

The Divorce of Queen Katharine, Henry V's Claim to the French Throne and *The Death of Humphrey, Duke of Gloucester,* are the subjects of the last chapters, completing a delightful, amusing and instructive volume, which no one interested in the English Common Law and Shakespeare can afford to leave unread.

Osgoode Hall, Toronto. WILLIAM RENWICK RIDDELL.

Automobile Insurance, by Charles A. Sunderlin. 1929. Albany: Mathew Bender & Co. Pp. xxii, 614. About the best thing that can be said for this book is that it furnishes easy access to the cases involving various types of automobile insurance law. It covers all types of insurance which in any way involves automobiles, such as fire, theft, collision, liability, conversion, and transportation. Although the main classification of the material in the book is reasonable enough, there seems to be no systematic or logical arrangement of the sub-topics or sections. For example, under the chapter "Waiver and Estoppel" there is a section entitled "Jury" containing only this sentence; "Whether insurer

made inquiry concerning condition of title to insured automobile on collision, policy is a question for the jury." Many of the sections contain but one short sentence and cite but one case, the author apparently being unable to assemble groups of cases upon the basis of principles involved. Too often each case is a law unto itself. Nowhere in the book is there any attempt at analysis or a discussion of principle. There is simply a repetition of the language of the cases without any effort to reconcile glaring inconsistencies between them or to work out any theory which might make the cases understandable. Little can be said in commendation of the author's style. In most of the sentences throughout the book, articles are omitted. The sentence quoted above is a fair sample. But the patience of the reviewer reaches the breaking point when he finds *ap*proximate used again and again for proximate and that even when the author quotes from a case using "proximate" be transmogrifies it into "*ap*proximate." (P. 356.)

GEORGE W. GOBLE.

College of Law, University of Illinois.

Law in the Making, by Carleton Kemp Allen. Second ed., 1930. Oxford: Clarendon Press. Pp. xxvii, 393.—This book is a considerable revision of a useful and important volume on the processes of law making, which first took form as a series of lectures in 1926, appeared in book form in 1927, and now in less than three years reaches a second edition. The work was extensively reviewed in the more academic law periodicals when it first issued. It deserves another notice now, for it has entered the shelves of few American lawyers. The author is Professor of Jurisprudence at Oxford. He has now assembled between two covers more historical observations on the ways and means through which a legal system is developed and remodeled than any single English author since Maine. The American lawyer who has read a little in legal theory and history and is not wholly at sea among present-day English institutions and Roman law will find here much to think about, something to apply to his daily work and many pages of pleasant reading.

The writer sets about to examine the curiously baffling problem of how people like the English build and gradually reconstruct that mass of institutions such as courts and bars, intellectual dogmas like contracts and corporations, attitudes and prejudices such as equitable maxims and legal precedents, which we call a system of law. To aid us, he assembles a museum of observations from English and classic Roman law, and a few from modern Continental, East Indian and other fields. He divides his discussion of what he calls the sources of law, in the sense of raw and finished building materials, into five departments. First, under "Sovereignty," he reviews with an easy touch the age-long battle of great theorists and political crusaders about the State, what it is and what it does in making and enforcing law. His lance is laid particularly against Austin's now battered pronouncement that law is all reducible to the command of the sovereign. Perhaps that battle still needs refighting. He digests understandingly some of the Continental jurists of yesterday and today who, under acute domestic experiences, have seen most of the old ideas of the necessary unity of sovereignty and of state dominance fade in the sunlight of reality. Even in America we are beginning to realize, under the exhibition of powerful political groups, administrative agencies and ineffective legislation, that law cannot be understood as the expression of the state depicted simply as a sort of omnipotent social giant. While Professor Allen has explored much of the troubled writing into which this conviction has carried the radical jurists, he cannot quite cast out the old precious rubrics of Anglo-American legal thought. His next topic is "Custom" as a source of law. Under this head, he discusses the effect of societal structure, folkways, mores, as well as particular merchant habits and feudal forms of living,—indeed the whole social background of law, and how these norms are converted (he says "interpreted") into legal materials by judges. Under the title "Precedent" as a source of law, the author makes the most original contribution of the book. Here as a lawyer he is thoroughly at home and his review of the way in which legal writings and decisions have been treated as authority in Roman and English law is broader than anything known to this reader. Under "Equity" as a law-contributing device, he sketches the history of this curiously human way of tempering a strict legal system with injections of a vaguer sense of justice. Its clumsiness oppresses him. He does not much explore the searching question of why mankind finds so much usefulness in so irrational a device. Under "Legislation," the author treats of constitutional, statutory and administrative law-making, pointing out particularly that the part of legislation is typically that of a minor and rapid modifier in private and even criminal law, that the development of administrative bodies with delegated powers has some new results on theory, and that the judge, as an applier, is the major influence in our law.

It is easy to quarrel with any book of this sort. It may be pointed out that while the author has toured the battlefields of the Continental writers who are skirmishing with psychology and the science of society he has brought little away. Probably there is little yet to bring except the impression of destruction. This the legal mind shrinks from, and surely caution is wise. There are, however, ideas fermenting in Germany, France and other countries which may some day destroy our Anglo-American halcyon world of Blackstone, Austin and Maine, and, as these ideas are entering America through the doorways of politics and social philosophy, we need more understandable writing about them on the law side. It may be suggested that the book huddles too much diverse material under the old Blackstone term of "Custom," and fails to distinguish between the whole organization of society which is the host of our parasite of law, and those petty rules of manor or merchant which are contributors of detail. Again the pages given to an effort to interpret the function of the judge as a law-maker are not quite satisfactory, although the writer has struggled long and intelligently. It can be pointed out that the author writes in the school of historical jurisprudence, and that there are new schools up and about. It may be he ignores too much the influence of political and moral beliefs on law such as Dean Pound expounds. When all is said and done, this book is an appreciable contribution to the English literature of the subject of legal evolution. Every lawyer meets the

process daily in the field, but on it only a few pause to speculate or generalize. Finally the book's style is sprightly and sparkling, written in a much more readable manner than such sober stuff usually inspires. This reviewer, although a modest rambler in legal theory, has never been sure how much general jurisprudence really contributed to the administration of law, but there are signs that the American lawyer is at last opening its little known and almost forbidden pages, and, if so, this book deserves some winter evenings. It is a great topic and here is a rich book, right or wrong.

JAMES GRAFTON ROGERS.

Boulder, Colorado.

Articles in Current Legal Periodicals

TULANE LAW REVIEW, December (New Orleans, La.)—The Revival of Comparative Law, by Roscoe Pound; The Statutory Presumption, by Paul Brosman; Wife's Action for Separation of Property, by Harriet S. Daggett.

Notre Dame Lawyer, November (South Bend, Ind.)—The Lawfulness of Law, by Gilbert Keith Chesterton; The Liability of the Municipal Corporation for the Negligent Acts of the Independent Street Contractor, by William McGuffey Hepburn; Should Indiana Call a Constitutional Convention? by Aaron H. Huguenard; Infant Stockholders, by Henry Hasley.

Harvard Law Review, December (Cambridge, Mass.)—Trusts Inter Vivos and the Conflict of Laws, by David F. Cavers; Spendthrift Trusts Created in Whole or in Part for the Benefit of the Settlor, by Erwin N. Griswold; Legal Adjustments of Personal Injury in the Maritime Industry, by Gustavus H. Robinson.

Iowa Law Review, December (Iowa City, Ia.)—An Experiment in Government and Law in the Philippines, by Eugene A. Gilmore; Proposed Jury Changes in Criminal Cases, by Rollin M. Perkins; Recent Efforts to Immunize Commission Orders Against Judicial Review: A Reply, by Maurice H. Merrill.

Journal of Criminal Law and Criminology, November (Chicago)—Crime and Criminal Justice, by E. Ray Stevens; Handwriting, Typewriting and Document Expert Testimony Tested by Its Convincingness, by Elbridge M. Stein; Index of Celebrated Cases, by G. E. Wire; Social and Ethical Judgments of Two Groups of Boys—Delinquents and Non-Delinquents, by James M. Reinhardt and Fowler Vincent Harper; Four Relationship Status of a Group of Delinquent Boys, by Fowler Vincent Harper and James M. Reinhardt; The Public Defender in the Municipal Courts of Columbus, by F. R. Aumann; An Historical and Clinical Study of Criminality with Special Reference to Theft, by Fred Brown; Criteria of Responsibility, by C. B. Farrar.

Law Notes, December (Northport, N. Y.)—John Marshall, by John Frederick Lewis; Juror as Witness, by Berto Rogers.

The Lawyer and Banker and Central Law Journal, November-December (New Orleans, La.)—The Law of Nations and Article V, by Benjamin S. Dean; The Hawes-Cooper Act Unconstitutional, by Charles Hall Davis.

Wisconsin Law Review, December (Madison, Wis.)—Summary Judgment Procedure, by Frank T. Boesel; "Yellow Dog" Contracts, by Erwin E. White.

Minnesota Law Review, December (Minneapolis)—Purchase by a Corporation of Its Own Stock, by Irving J. Levy; Can the Court Aid Cooperative Marketing? by Carl F. Arnold.

Yale Law Journal, December (New Haven, Conn.)—Determining the Ratio Decidendi of a Case, by Arthur L. Goodhart; The Present Copyright Situation, by Thorvald Solberg; The Liability of a Transferor by Delivery and a Qualified Indorser, by William E. Britton.

West Virginia Law Quarterly, December (Morgantown, W. Va.)—The West Virginia Water Power Act, by James W. Simonton; Pleading and Practice Under the Revised Code, by Lawrence R. Lynch.

Cornell Law Quarterly, December (Ithaca, N. Y.)—New York and Its Waters, by William Shankland Andrews; Personal Life Insurance Trusts in New York, by Henry S. Fraser; On Comparing "Friendly Adjustment" and Bankruptcy, by Saul Richard Gamer; The Mortgage Registry Tax in New York, by Leonard B. Zeisler.

New York University Law Quarterly Review, December (Brattleboro, Vt.)—The Codification of the Responsibility of States, by Marjorie M. Whiteman; The Enforcement of Commercial Arbitration Agreements in the Federal Courts, by Harry Baum, Leon Pressman; Tyranny of Impeachment Procedure, by J. D. Lydick; Early Irish Laws and Institutions, by Eoin Macneil; Theory of Pleading in California, by Leon R. Yankwich.

California Law Review, November (Berkeley, Cal.)—Convertible Securities—Legal Aspects and Draftsmanship, by George S. Hills; The National Statutes System: A Plea for a New Publication, by Thomas S. Dabagh.

University of Pennsylvania Law Review, December (Philadelphia)—Principles Governing the Licensing of Broadcasting Stations, by Louis G. Caldwell; The Validity of Void Divorces, by Fowler Vincent Harper; Differing Federal and State Interpretations of the Transfer Inheritance Tax Applied to Trusts Inter Vivos, by Louis Barcroft Runk.

Washington Law Review November (Seattle)—A Modern Titan, by Dr. Stephen B. L. Penrose; President's Address, by Edward W. Allen.

United States Law Review, December (New York City)—The Case System: A Criticism, by Robert E. Ireton; Restraints on Alienation and the Rule Against Perpetuities, by Walter H. Anderson.

Texas Law Review, December (Austin, Tex.)—The General Issue in Texas, by Robert W. Stayton; Conflict of Laws—Torts—Texas Decisions, by George Wilfred Stumberg.

Oregon Law Review, December (Eugene, Ore.)—The Public and the Bar, by E. O. Immel; Is Our Judicial System Responsible for Our Crime Condition? by Alfred E. Clark; The Lawyer in Congress, by Frederick Steiwer; The Problems and Activities of the California State Bar, by Joe G. Sweet; Some Phases of the Work of the American Bar Association, by James F. Ailshie.

North Carolina Law Review, December (Chapel Hill, N. C.)—Four Suggested Improvements in the North Carolina Legislative Process, by M. T. Van Hecke; Proposals for Legislation in North Carolina; Codification of Criminal Procedure in North Carolina, by Albert Coates.

Marquette Law Review, December (Milwaukee, Wis.)—The Doctrine of Reasonableness in the Police Power, by Samuel M. Soref; Should Wisconsin Adopt Compulsory Automobile Insurance? by Joseph A. Padway; A Short Excursion into the Field of Conflict of Laws in Wisconsin, by Clifton Williams.

Michigan Law Review, December (Ann Arbor, Mich.)—Claims Against the Creditor as Defenses to the Surety, by H. W. Arant; Cooperative Associations and the Public, by John Hanna; The Supreme Court's Construction of the Self-Incrimination Clause, Part II, by Edward S. Corwin.

Rocky Mountain Law Review, November (Boulder, Colo.)—The Swing-Johnson Bill and the Supreme Court, by Russell Denison Niles, Jurisdiction for the Purpose of Inheritance Taxes with Special Reference to Montana, by David R. Mason; Constitutional Regulation of Legislative Procedure in Colorado, by Thomas P. Fry.

Canadian Bar Review, December (Toronto)—Is the Canadian Legislation on Trade Marks Ultra Vires? by W. P. M. Kennedy; Anomalies in the Law of Wagering Contracts, by G. H. Ross; Implied Agency of the Wife for Necessaries, by C. A. Wright; Law and Practice, by the Rt. Hon. Lord Tomlin.

Southern California Law Review, December (Los Angeles, Cal.)—Confessions and Methods Employed in Securing Them, by Bates Booth; Administrative Problems in the Legal Aid Clinic, by John S. Bradway; Land Burdens in California—Easements, by William Edward Burby.

Virginia Law Review, December (University, Va.)—Liquidated Damages, by Charles T. McCormick; Jurisdiction of Foreign Corporations in Personam, by Jay Leo Rothschild; Tendencies in the Taxation of Intangibles, by Charles L. B. Lowndes.

Washington Letter

Anti-injunction Legislation

January 8th.

ON December 16, 1930, Representative La-Guardia introduced H. R. 15266, defining combinations and conspiracies in trade and labor disputes and prohibiting the issuance of injunctions therein. This bill, which was referred to the House Judiciary Committee, is substantially the same as the so-called Shipstead anti-injunction bill, S. 2497, which is now on the Senate Calendar, having been adversely reported by the Committee.

On December 23, 1930, Senator Couzens, Chairman of the Senate Committee on Interstate Commerce, stated that he plans to call the Committee together soon after January 5th to consider resubmitting to the Senate the Parker Bill (H. R. 10288) for Federal regulation of Interstate commerce by passenger buses. The bill was recommitted to the Committee December 4th, opposition having been made to the method of requiring certificates of public convenience and necessity. Senator Couzens said it is probable that the Committee will simplify the bill in order to obtain action by the Senate.

Action by Congress on the bill (H. R. 12549) providing for a general revision of the copy right laws will in all probability be taken, it was stated orally by Speaker Longworth on December 22nd. The bill is the unfinished business on the House Calendar.

On December 4, 1930, Senator King introduced Senate Resolution 354, authorizing an investigation to determine the desirability or necessity of strengthening or modifying the anti-trust laws. On December 8th, Senator McKellar introduced a similar resolution S. Res. 358, providing for an investigaton of the operation and enforcement of the antitrust laws, and the question of their modification. Both of these measures were, on December 15th, referred to a subcommittee of the Senate Judiciary Committee, composed of Messrs. King, Robinson and Hastings.

On December 17, 1930, Senator Schall introduced S. 5412 to amend section 33 of the Judicial Code, as amended, with respect to the removal of actions against receivers of the courts of the United States. The bill, which was referred to the Senate Judiciary Committee, reads as follows:

"That section 33 of the Judicial Code, as amended, is amended by adding at the end thereof the following: 'Notwithstanding the provisions of this section or of any other law, no such suit or prosecution against any receiver appointed by a court of the United States shall be removed to any district court solely on the ground that he is an officer of such a court.'

"Sec. 2. The provisions of this Act shall not affect any suit or prosecution removed to a district court prior to its passage."

Bill Providing for Payment of Interest by United States

On December 19, 1930, Senator Copeland introduced S. 5459 to amend section 177 of the Judicial Code. The bill, which was referred to the Senate Judiciary Committee, reads as follows:

"That in an action against the United States to recover a liquidated debt a judgment for the claimant shall include interest at 6 per centum from the time the debt was due and payable, and in all other judgments against the United States the court shall include interest at the same rate as an element in the damage awarded if necessary fully to compensate the claimant. All judgments against the United States shall bear interest at the rate of 4 per centum from the date of such judgment until payment of the same."

Bill to Provide for Plant and Cereal Patents

On December 18, 1930, Representative Carter of California introduced H. R. 15423, to provide for plant and cereal patents. This bill would amend the patent laws to provide a patent for one who has invented or discovered and asexually reproduced any distinct and new variety of plant or cereal, other than a tuber-propagated plant. No such plant or cereal which has been introduced to the public prior to the approval of the bill would be subject to patent. The bill was referred to the House Committee on Patents.

Measures Approved by the President

The bill (H. R. 10341) to amend section 335 of the criminal code, by defining petty offenses, was approved by the President December 16, 1930, Public No. 548, 71st Congress. The text of this measure was printed in the January issue of the JOURNAL, page 28.

On December 16, 1930, the President approved the act to repeal obsolete statutes, and to improve the United States Code (H. R. 10198). The law, which is Public No. 547, 71st Congress, reads as follows:

"Be it enacted . . . That the following obsolete sections and parts of sections of the Revised Statutes and Statutes at Large are hereby repealed:

STATUTES (Stat. or R. S.)	U. S. CODE
R. S. 162	Title 5, sec. 26
R. S. 196	Title 5, sec. 107
12 Stat. 505, sec. 6, Act of July 2, 1862, c. 130	Title 7, sec. 306
R. S. 1156	Title 10, sec. 182
R. S. 1243, first sentence	Title 10, sec. 941
39 Stat. 308, fifth complete paragraph, Act of July 1, 1916, c. 209	Title 16, sec. 42
34 Stat. 832, sec. 3, Resolution of June 11, 1906, No. 27	Title 16, sec. 50
39 Stat. 308, third complete paragraph, Act of July 1, 1916, c. 209	Title 16, sec. 56
40 Stat. 152, fifth paragraph, Act of June 12, 1917, c. 27	Title 16, sec. 106
40 Stat. 152, seventh paragraph, Act of June 12, 1917, c. 27	Title 16, sec. 116
40 Stat. 152, twelfth paragraph, Act of June 12, 1917, c. 27	Title 16, sec. 135
32 Stat. 765, secs. 3 and 4, Act of January 9, 1903, c. 63	Title 16, secs. 143, 144
36 Stat. 1421, second sentence of seventh complete paragraph, Act of March 4, 1911, c. 285	Title 16, sec. 180
R. S. 2463	Title 16, sec. 597
20 Stat. 470-471, secs. 1 and 2, Act. of March 3, 1879, c. 189	Title 16, secs. 598, 599
28 Stat. 814, Act of March 2, 1895, c. 182	Title 16, sec. 600
R. S. 2061	Title 25, sec. 38
35 Stat. 71, first complete paragraph, except the second proviso, Act of April 30, 1908, c. 153	Title 25, sec. 94
35 Stat. 73, third proviso, Act of April 30, 1908, c 153	Title 25, sec. 103
37 Stat. 496, Act of August 24, 1912, c. 367	Title 30, secs. 111-113
R. S. 3482	Title 31, sec. 208
24 Stat. 402, sec. 3, Act of February 12, 1887, as amended by 34 Stat. 450, sec. 3, Act of June 22, 1906, c. 3515	Title 32, sec. 32
30 Stat. 1007, sec. 11, Act of March 3, 1899, c. 413	Title 34, sec. 391
34 Stat. 554, second complete paragraph, Act of June 29, 1906, c. 3590	Title 34, sec. 392
35 Stat. 753, last paragraph, Act of March 3, 1909, c. 255	Title 34, sec. 393
33 Stat. 349, last paragraph, Act of April 27, 1904, c. 1622	Title 34, sec. 682
34 Stat. 554, third complete paragraph, Act of June 29, 1906, c. 3590	Title 34, sec. 683
R. S. 2469	Title 43, sec. 19
R. S. 2470	Title 43, sec. 20
R. S. 461, as amended by 25 Stat. 76, Act of April 2, 1888, c. 54, and 35 Stat. 469, sec. 15, Act of May 29, 1908, c. 220; 25 Stat. 557, Act of October 12, 1888, c. 1098	Title 43, sec. 21
R. S. 2230	Title 43, sec. 61
R. S. 2231	Title 43, sec. 62
R. S. 2232	Title 43, sec. 63
31 Stat. 270, sec. 3, except the proviso, Act of June 5, 1900, c. 716	Title 43, sec. 181
34 Stat. 1248, Act of March 2, 1907, c. 2568	Title 43, sec. 262
40 Stat. 675, thirteenth complete paragraph, Act of July 1, 1918, c. 113	Title 43, sec. 380
32 Stat. 389, sec. 5, third sentence, Act of June 17, 1902, c. 1093	Title 43, sec. 476
R. S. 2353	Title 43, sec. 672
R. S. 2356	Title 43, sec. 677
R. S. 2364	Title 43, sec. 683
R. S. 2358	Title 43, sec. 684
R. S. 2359	Title 43, sec. 685
19 Stat. 221, sec. 2, Act of January 12, 1877, c. 18	Title 43, sec. 686
R. S. 2360	Title 43, sec. 687
R. S. 2398	Title 43, sec. 754
R. S. 2399, as amended by 26 Stat. 650, Act of October 1, 1890, c. 1262, 28 Stat. 285, Act. of August 15, 1894, c. 288, and 32 Stat. 120, Act of April 26, 1902, c. 592	Title 43, sec. 755
R. S. 2400	Title 43, sec. 756
R. S. 2404	Title 43, sec. 764
R. S. 2405	Title 43, sec. 765
R. S. 2407	Title 43, sec. 767
R. S. 2411	Title 43, sec. 771
37 Stat. 687, Act of February 27, 1913, c. 85	Title 43, sec. 860
R. S. 4205	Title 46, sec. 99
34 Stat. 1162, both provisos, Act of March 2, 1907, c. 2511	Title 48, sec. 4
36 Stat. 248, thirteenth paragraph, Act of March 23,	

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Reorganization of American Bar Association

"It is thought by some that, if the annual business meetings were made up of representatives from the various bar organizations of the country, it would enable the representatives from different organizations and states to confer together over proposed legislative issues before the association and to engage in representative discussion rather than mass discussion, which is necessary now if any discussion takes place at all at an annual session. In this way each state bar association would be entitled to representatives in proportion to the number of its members who were also members of the American Bar association. It would then be a truly representative body. Under the present system from seventy-five to ninety per cent of the members present at an annual meeting come from the immediate locality where the meeting is being held. For example, a meeting held in California will have but few members present from the southern and eastern states, except from large centers like New York, Philadelphia, Chicago and St. Louis, which will send a fairly representative number. On the other hand, a meeting held in Chicago is entirely dominated by lawyers from Chicago and the nearby cities and communities. If, on the other hand, the meetings were organized on the representative plan, California would have just as many votes at a Chicago meeting as it would have in San Francisco or Los Angeles and Illinois would have no more votes in Chicago than it would have in Seattle or Denver. This method could very easily be invoked for the purposes of debate, discussion and voting upon measures and issues, and, at the same time, it would not preclude any member of the bar from any part of the country attending the meetings and hearing the discussions and appearing before the committees. It is my personal belief that the association will eventually have to come to some kind of a working basis on the representative system."—*From address by James F. Ailshie before Oregon State Bar Association.*

SOCIALIZATION OF THE LAW

Evolution of the Race Must Be Given a Chance to Work Through Lawful and Orderly Processes in Accordance With Anglo-Saxon Genius—Social Tendency of the Courts Is Natural Development of Spirit of the Common Law — Record of United States Supreme Court One of Marvelous Advancement in This Respect

By Robert N. Wilkin
Member of New Philadelphia, Ohio, Bar

DURING the previous session of Congress the press dispatches from Washington carried frequent criticisms of our courts for the "social trend" of our modern jurisprudence. In the debate over the nomination of Chief Justice Hughes many senators were quite outspoken against the tendency of our courts, particularly the Supreme Court, to determine legal causes by social and economic considerations. Senator Glass of Virginia stated briefly the criticism which was implied, if not expressed, in the remarks of nearly all the senators who opposed the appointment of Justice Hughes: "The Supreme Court in recent years has gone far afield from its original function and has constituted itself a court in economics and in the determination of social questions rather than in the interpretation of statutes passed with reference to the Constitution itself."

This tendency of our courts has been noted not only by our senators but by the country generally. It could hardly escape the attention of any one who studies the trend of the times. The Wall Street Journal said recently, "The Supreme Court is not only an institution for the settling of legal disputes, but also of social and economic problems."

The adverse criticism of this social tendency, like all criticism of our courts, is likely to have a very pleasing sound to the popular ear, and is, therefore, likely to be given unwarranted credence. But such criticism is strangely out of harmony with the views not only of our greatest jurists, but of our teachers of jurisprudence and social philosophers. Justice Holmes, Justice Cardozo, Dean Pound and many other leaders in legal thought have furthered the movement. Dean Pound, in order to present the matter in terms more pleasing to the modern mind says, "Let us think of the problem of the end of law in terms of a great task or great series of tasks of social engineering." And the writings of the ablest members of our legal faculties are in general accord and unite in pointing out—to use the words of Howard Lee McBain in "Whither Mankind"—"the increasing need in the modern world for so-called sociological jurisprudence."

Now such divergence of senatorial and juristic opinion naturally raises some questions. What is this social influence at work in our courts? Does the "socialization of the law" constitute a new or strange jural process? Or is it a natural development in the evolution of our legal system? Is it contrary to the Constitution? Is it in harmony with the spirit of our Common Law?

It is generally conceded that the prime purpase of law is to preserve the peace. "In its beginning law is no more than a body of rules by which controversies are adjusted peaceably." (Pound.) And that remains its essential purpose throughout its history. But it is quite apparent that the principles and administration of law required by feudal times would be very different from those required by modern times. And the legal problems which confronted a sparsely-settled, agricultural country of pioneers, would naturally be very different from the problems of modern, industrial, urban America. When each home and each estate was a separate and independent unit of society with its own lights, its own water, its own transportation, a legal system which protected private person and private property was sufficient. But when society became congested and its life was dependent upon common lighting systems, common water and transportation systems, then the law had to provide for the regulation of such public utilities. And prior to the time of the great aggregations of capital for industrial development, labor unions were unknown because collective bargaining was unnecessary. And in that day it was a criminal offense to interfere with a man's employees or for workmen to combine for higher wages or better working conditions. But with the advent of the great capitalistic corporations and associations of employers, the law, in order "to maintain the balance between conflicting interests," had to recognize labor unions, encourage collective bargaining and permit peaceful picketing. The lengthening chapters of social legislation since the civil war have moreover gradually broadened the field of our courts' activities. Pure food laws, minimum wage laws, and laws providing for poor debtors' exemptions, industrial insurance, old age pensions, regulation of the use of the air for travel and broadcasting, conservation of natural and social resources—all such enactments have greatly enlarged the sphere of the law and increased its social influence. And not only do such legislative enactments raise economic problems for our courts, but the philosophy of life and the trend of thought which brought them into being must necessarily be reflected in the social consciousness of lawyers and judges who are engaged in the interpretation and enforcement of law. And so we come to think,

with Justice Cardozo, that "The final cause of law is the welfare of society."

A few instances will show this social influence at work in our courts. First let us take the case of the "spite fence." The courts of the nineteenth century, being concerned principally for the freedom of the individual and the rights of private property, held that a man might do anything on his own property which did not infringe upon the right of his neighbor to do the same. Hence a man might erect a high fence just within the boundary of his own property and paint it any color or hideous combination of colors. And the courts would do nothing more than recognize the right of his neighbor to erect a similar fence. But of late the courts have been inclined to limit a man's freedom with reference to his own property to such acts as are reasonable and not prompted by malice. They recognize the right of his neighbors to a full, free enjoyment of their property and limit the individual to such acts as are consistent with modern social life. The common interest in free light and air is emphasized, and the use of private property is restricted to such acts as do not unreasonably infringe upon that common interest. The erection of a spite fence, being unnecessary and antisocial, will now be restrained.

And while the courts, in furtherance of social interests, will restrain the erection of a spite fence, they seem inclined, in furtherance of the same social interests, to extend the right to erect a party wall. The Supreme Court of the United States has decided that a statute of Pennsylvania which gives a property owner the right to build a party wall on the boundary line of his lot without liability to the adjoining owner (except for damages negligently caused) does not violate the constitutional provision that private property shall not be taken unless by due process of law. The court held that the right of private ownership may be subjected by statute to the general interest in party walls; and that a man who buys a lot thereafter is held to have taken it with the understanding that a strip six inches or a foot wide is liable to use by adjoining owners.

Laws which prevent the assignment of a husband's wages except with the consent of his wife have been upheld. In former times such laws would have been considered an infringement of a man's freedom to contract. But now a man's right to contract, his right to dispose of his own property, is subordinate to the community's interest in the security of domestic institutions. When the practice of assigning wages in modern industrial communities became so commercialized that it threatened the family, the essential unit of society, private right had to be sacrificed to some extent to social interest.

In some jurisdictions laws which impose liability even in the absence of fault have been upheld. The owners of automobiles have been held liable for damages, although they were not driving the automobile when the damage was done, were not present and had not consented to its use. Until quite recently it had been the policy of the law to consider only the question raised by the conflicting interests of the injured individual and the individual driver. But now it is the policy of the law to consider the general security of life, limb and property. And the owner is held accountable if his car is upon the highway in charge of any but a licensed driver. And so again modern conditions made it necessary that private right be subject to social interests. And recent enactments for universal compulsory liability insurance, and the tendency of the courts to uphold them, carry the social interest still further.

Such is the socializing influence upon cases which involve mere private rights. But the influence goes much further, and, indeed, becomes more pronounced when the courts are called upon to review such matters as the conduct of labor unions and the orders of public utility commissions. Indeed such social and economic considerations are so general that they become a part of the work of our courts in connection with the problems raised by the laws affecting public administration, public utilities, insurance, banking, taxation, trusts, employers' liability, criminal cases, prohibition, etc. And in such considerations the importance of precedent yields to the importance of principle. Whereas formerly the origin and history of legal institutions were the dominant interests, their ends and consequences are now our chief concern.

Now it is perfectly natural that when these economic and social considerations begin to affect such matters as the rates of public utilities and contracts of employment, sharp issues should develop between the public and vested interests and between capital and labor. The conflict becomes so intense that it over-runs old party lines, as it did in the debate in the Senate over the recent appointments to the Supreme Court. But there was a striking inconsistency in the criticisms of the Senators who opposed confirmation. In their objections to the confirmation of Justice Hughes, they said the courts had gone too far with reference to such social considerations, and then they opposed the confirmation of Judge Parker because he had not gone further in such matters. They said the Supreme Court had exceeded its constitutional authority when it had assumed to declare unlawful the order of the Maryland Public Service Commission fixing the rates to be charged by the United Railway and Electric Company of Baltimore. They objected to the Court's assumption of power to pass upon such economic and social questions as were involved in the determination of what is a fair return for a utility. But later they opposed Judge Parker's nomination because he had not assumed authority to say that the "yellow dog contract" was contrary to public policy and void. Because of social considerations advanced by them against a contract which binds employees not to join a union, they thought Judge Parker should have refused such contract the protection of the court's order of injunction. Such inconsistency of criticism is mentioned merely to show the impossibility of avoiding such social considerations in this day. Even those who oppose them must resort to them.

But when we once recognize the insistence of these social questions, we are then compelled to recognize the righteousness of the demand of the opposing Senators that a fair proportion of the members of the Supreme Court should be men whose birth and training and experience have given them a sympathetic understanding of the social

interests which such Senators represent. As Senatory Nye put it: "The Senate has not only the right but also has good reason, in the face of present day demonstration of the insistence by property for still greater rights, to consider environment, training, and probable sympathies of great weight as qualifications of a Supreme Court Justice." And in view of the very social nature of the movement, there is special force in the statement of Senator Borah who, speaking on the qualifications of a judge, said, "We must weigh his conception of human rights, for we all know that the law takes on something of the heart and soul, as well as the intellect, of those who construe it."

And that statement almost voices the aspiration of the movement. It is an effort to have the law take on something of the heart and soul as well as the intellect. Men are rebelling against the sovereignty of property as they formerly rebelled against political sovereignty. They have learned that arbitrary economic power can be as oppressive as political tyranny. The struggle is so intense that at times it breaks out in open defiance of law and order. But for the most part the social revolution is being worked out through our legislatures and courts. The ferment is at work and it is futile for our senators to oppose the effort of our courts to deal with it. Rather they, and the public at large, should give to the problem which confronts our courts a more sympathetic understanding.

A prominent lawyer and statesman, writing on labor relations and the law, has thus put the problem:

"Our industrial progress has been so rapid that our institutional progress could not keep pace with it. We have left our courts with nothing better than medieval conceptions of the rights of property and man to apply by analogy in a situation too intricate and vital in its social implications to be so ruled. It is as though we were to give our courts the Zulu Code and ask them to apply it to the adjustment of American domestic and business problems. As a consequence, when these raw and bleeding controversies come into court our judges have had to forget that it is their duty to declare and not dare to give the law."

And a member of the United States Circuit Court of Appeals thus writes of the problem from the viewpoint of the judge:

"He should remember, in taking up his problem, that he is pulled in opposite directions by two forces. On the one side is the tendency toward rigidity for the sake of certainty; on the other, the demand of new and changing conditions to burst and throw aside the old formulas. . . In the middle and latter part of the nineteenth century the tendency in our country was probably toward rigidity; but equity restrained a far swing. Now the swing is the other way in response to the demand that more than the equities of the parties be regarded, namely, the social effects of the decision upon the body of the people."

There are two conflicting principles ever present before our courts: rest and motion, stability and progress, the spirit of change and the spirit of conservation. And "To bring about reconciliations is the great work of jurists." "Law must be stable, and yet it cannot stand still." The glory of the Common Law has been the freedom which it has allowed to both of these principles. Its doctrine of *stare decisis* has placed a high value upon precedent, and yet it has left its judges free to develop the theory underlying precedent so that such theory can be applied to new conditions of life. Our recorded precedents form a chain of fixed laws that binds us to the experience of the past; and the creative judgment is a process of discovery that leads us forward amid the ever changing combinations of events—which "beat upon the walls of ancient categories."

Let those who criticize our courts *today* for their too rigid adherence to antiquated laws and *tomorrow* for their too free departure from respected precedent, try to understand the nature of the problem which confronts our courts. Let them see that the life of our legal system lies in that very struggle between stability and change. And let them see that such struggle is an incident of all life. Did not the scientists in time learn that the *fixed* stars, from which they had been making their measurements, were also in motion? Did not the physicians discover in time that many of their cures were worse than disease? Do not the artists make fixed rules from past accomplishments, and then find that their ideals are always leading them into conflict with those rules? Let those who clamor for greater certainty and rigidity of law study the experience of France, Germany and other countries that have completely codified the law. They will find that those countries are inclined to depart from their mechanical administration of justice and are coming more and more to adopt the administrative process of the Common Law countries. And let those who clamor for a greater freedom from precedent read the experience of Russia.

The Senators need not fear that this social reform will undermine our Constitution. To preserve our Constitution we must preserve its spirit and give it a chance to function in our own times and in new circumstances. The surest way to make it a dead letter is to confine its spirit within a literal construction of its own words and phrases. Take for instance the case of The United Railways and Electric Company v. The Public Service Commission. It would paralyze the present day influence of the Constitution to adopt the view of those senators who criticized the Supreme Court for its ruling in that case. They advanced the theory that because the Constitution said nothing about regulation of rates in its grant of power to the Supreme Court, the court was without authority to review the order of the Commission. "What is there in the Constitution," they ask, "that gives any guidance as to whether 5, 6 or 8 per cent is a fair return on public-utility property?" And because the framers of the Constitution could not have had such questions in mind when they wrote the Constitution, the senators argue that the Supreme Court's power cannot be expanded to cover such "highly controversial economic theories."

But when the Supreme Court, in furtherance of this social development, upheld the laws giving public service commissions authority to fix the rates to be charged by public utilities, it necessarily followed that the court would have to determine that an order fixing unreasonably low rates constituted the taking of property in violation of that provision of the Constitution which forbids the taking of private property without just compensation. And it would be unreasonable to limit the meaning of the term to such taking of property as the framers of the Constitution had in mind. The spirit of the Constitution forbids any taking of property without just compensation and is broad enough to cover the complicated and indirect tak-

ing which might otherwise be practiced in this day. To deny a person the income and benefits of his property is, in effect, to take his property. If the law should restrict a landlord's power to collect rent to such a rate as would deny him sufficient income to pay taxes and insurance, it would, in effect, take his property. It is this theory that the Supreme Court has applied in the rate cases. It has merely applied the fundamental principles of the Constitution to the problems of our own day. While it is right for the Senators to be very careful as to what manner of man should be a member of the Supreme Court, it is wrong for them to criticize the court because it has tried to extend the principles of the Constitution to our social and economic problems.

The Supreme Court is generally criticized for being conservative. And it is well that it should be so, since it is the Court of last resort and the guarding and guiding influence of the Constitution. Yet on the whole, the record of the Supreme Court is one of marvelous advancement and achievement. While the members of the Court have been referred to as "old men long cloistered from modern currents of affairs," the fact is that they have shown a keener comprehension of the "social revolution brought about by the machine" than legislators generally or even labor leaders. The decisions of that distinguished court have been in the main progressive, just and brave. The Constitution continues to be safe in its hands. Among the members of the court are legal historians and social philosophers of the first rank; it is not likely that they will overlook the experience of the past or allow to pass unnoticed the recent achievements of the social sciences.

Nor need there be any apprehension that this social tendency of our courts is contrary to the spirit of the Common Law. On the contrary it is a natural development of that spirit. Two outstanding characteristics of the Common Law are:

(1) Its love of individual liberty, a belief in the inherent rights of man, a high regard for personal independence, or, as Guizot put it, "the sentiment of personality; of human spontaneity in its unrestricted development"; and

(2) Its adherence through all vicissitudes to the supremacy of law; the characteristic which in the seventeenth century maintained the law above the royal prerogative and gave rise to Coke's classic remark that the king ought to be under God and the law; the characteristic which through the eighteenth and nineteenth centuries preserved our Constitution and the supreme law of the land against the pressure of arbitrary legislative power; and which in the twentieth century maintained the supremacy of law against the proposal for recall of judges and judicial decisions.

The social reform at work in our courts is in strict accordance with those outstanding characteristics. But even if it were not, those characteristics have so much of the virility and tenacity of the Germanic tribes from which we received our Common Law, that they cannot easily be subverted. The spirit of the Common Law is not easily broken. It has predominated through the years over all opposing forces. That legal system which could assimilate the Law Merchant, and so much of the Civil, Ecclesiastical and Maritime Law, and has successfully withstood the shock and strain of the shifting generations, is not likely to develop any grave functional disorder over the social influence of this day.

It is certainly very apparent that grave social questions are before us. One must be smug to the point of blindness who cannot see the burning need of economic and social adjustments. Economic pressure forces merger after merger and the concentration of wealth accumulates. Social interests clamor for limitations upon the sovereignty of property. They cannot be restrained forever. The evolution of the human race must be given a chance to work through lawful, orderly processes, in accordance with the genius of the Anglo Saxon race, or it will work through processes more abrupt. If the ferment is confined it will burst its container. Development and progress cannot be stayed. If civilization consists of "the development of individual life and the progress and melioration of social life," then surely sociological jurisprudence is a natural process of civilization.

AMERICAN BAR ASSOCIATION COMMITTEE ON COMMERCE

Annual Meeting to Be Held in the Building of the Chamber of Commerce of the State of New York, 65 Liberty St., New York.

Tuesday, Wednesday and Thursday, March 24, 25 and 26, 1931

AGENDA

Tuesday, March 24

10:00 A. M.:
1. Suggestions of
   (a) New business.
   (b) Other subjects than hereon listed.
2. United States Contract and Sales Bill.
3. Bill providing for payment of interest on judgments rendered against the United States.
4. Bill relating to motor vehicles used in Interstate Commerce.

2:00 P. M.:
5. Proposed revision of calendar.
6. Bills of lading for carriage of goods by sea.

Wednesday, March 25

10:00 A. M.:
1. Proposed amendment to Federal Anti-Trust laws.

2:00 P. M.:
2. Proposed amendment to Federal Anti-Trust laws.
3. Federal Trade Commission practice and procedure.
4. Amendments to Federal Arbitration law.

Thursday, March 26

10:00 A. M.:
1. Resale prices—Capper Kelly Bill.
2. Regulation of the sale and distribution of pistols in Interstate Commerce.

2:00 P. M.:
3. Executive Session.

CORPORATE SECURITIES—ESPECIALLY COMMON AND PREFERRED STOCKS

Financial Considerations Determining Types of Securities Which Should Be Issued—Common Stock and Holding Companies—Suggestions as to Issue of Non-Par Shares—Innumerable Varieties of Preferred Stocks—Importance of Expressing Clearly What Preferred Stock Dividend Rights Are, Where Preferred Dividend Is Not to Be Cumulative, etc.*

By Isador Grossman
Member of the Cleveland, O., Bar

At the outset of this discussion I shall, at the risk of being too elementary, advert to certain fundamental financial considerations which largely determine the types of securities which a corporation should issue.

First: Whereas bonds, whether mortgage or debenture bonds, are obligations, failure to pay interest or principal on which as they mature may result in receivership for the corporation or foreclosure of the mortgage security, stocks, whether preferred or common, are not obligations, and failure to receive dividends thereon does not give the right to the holders thereof to throw the company into receivership or otherwise to embarrass it.

This being so, bonds and notes having a maturity of more than one year should not be issued by a corporation unless its probable future earnings are likely to be reasonably constant and at least twice the interest charges on the bonds or notes proposed to be issued.

Second: If earnings are likely to be irregular, but when averaged over a period of years are entirely likely to yield a reasonable margin over dividends payable on the preferred stock, preferred stock may be issued, but the dividend payable thereon should in no case exceed one-half the average earnings of the last three to five years, if the promotion is a merger or reorganization of previously existing plants, or one-third of the expected earnings in the case of a new enterprise, even in an established industry. Of course, if the earnings can be predicted with reasonable certainty, it is sometimes advantageous to issue bonds rather than preferred stocks, as money secured through sale of bonds is often secured more cheaply than through the sale of any form of stock, the interest rate on bonds being generally lower than the dividend rate on preferred stock, and the underwriting charge being also less.

It is to be borne in mind, however, that in the case of industrial corporations where the fluctuations in net earnings are great, conservative executives are often reluctant to issue bonds. Many of them prefer to hold the right to issue bonds in reserve as a back log in case adversity should strike the corporation—this because bankers are often loath to make loans to companies whose plants are mortgaged.

Third: Common stock, and only common stock, should be issued when the earnings of the new corporation are unpredictable. In this connection it is to be borne in mind that there is no connection between the cost of starting an enterprise, i.e., cost of plant, machinery, equipment and initial working capital, and its probable income. In other words, there is no assurance that because it cost a certain sum to launch an enterprise, for that reason it will have earnings sufficient to pay either interest or dividends upon such cost, and it is therefore safer to launch the enterprise with common stock rather than preferred stock or bonds.

Fourth: The types of securities to be issued will depend very largely on the traditions and prejudices prevailing among investors in the investment market in which they are to be sold. For instance, in some States the investor has developed a very definite prejudice in favor of stocks rather than bonds, because bonds are taxable as personal property, whereas stocks, when held by residents, are not.

In this connection it is well to bear in mind that not only personal property tax laws, but other tax laws may determine what securities should be issued. Thus, for instances, during the war period, when excess and war profits taxes were in vogue, tremendous savings in taxes were effected if stocks were issued rather than bonds, because the proceeds of the sales of stocks were included in invested capital, whereas the proceeds of bonds were not.

Fifth: The fashion which happens for the moment to be prevailing in securities will very materially affect the financial setup. For instance, during the halcyon days of '28 and '29, bonds as such were hopelessly out of fashion, as were also preferred stocks. If either bonds or preferred stocks were to be marketed at that time, it was almost absolutely necessary to make them convertible into common stock, or else that warrants be issued with them, either detachable or non-detachable, giving to the purchaser of the bonds or preferred stock the right to purchase common stock of the corporation. In other words, the public was hungry for speculative securities, and the trend was away from bonds, debentures and old-time preferred stocks with fixed and limited incomes, to securities that had some speculative possibilities, especially the common stocks. Indeed, so little did the public investigate the stocks offered, that many utterly worthless stocks were thrown into circulation, which fact ultimately shattered the confidence of

*Address before the Lawyers Club of Dayton, Nov. 25.

the public in good common stocks and depreciated the value of all of them.

As corporations found it easy in '28 and '29 to sell their common stocks at outrageously high prices, they sold them in great quantities, with the result that now they have excessive issues of stocks outstanding on which they will find it difficult in normal times to pay reasonable dividends. The volume of common stocks created was so great that the public was unable to absorb them or the money market to take care of them—factors which doubtless contributed materially to the stock market smash. To be sure, a large part of the excessive quantities of common stocks that were issued in the last few years were stock dividends, but as investors bought the split-up shares at very high figures, the corporations will be unable to earn anything like reasonable dividends on the cost to their stockholders.

Of course, for some concerns which needed capital for reasonable and legitimate purposes, the sale of common stocks was very fortunate, in that they fortified themselves with such capital without increasing their indebtedness and fixed charges, thus putting themselves in excellent shape to weather industrial storms. As a matter of fact, some strong companies, taking advantage of the wild prices which common stocks then commanded, shifted their capital structure by selling common shares at the high prices then prevailing and calling in their bonds and preferred stocks with the proceeds of such sales. On the other hand, many concerns which, by reason of ingrained prejudices would under no circumstances have saddled themselves with debentures or mortgage bonds, or even preferred stocks, in that they regarded such issues as a last resort, would have been saved from reckless over-expansion had they not been able so readily and advantageously to market their common stocks.

But while two or three years ago it was impossible to sell any security that had not some speculative possibilities to it—the speculative bug having bitten even some of the most conservative investors—a revulsion of feeling has set in since the stock market debâcle of a year ago, and today it is exceedingly difficult for a banking house to sell a large issue of common stock. To what extent there has been a face-about on the part of investors in their investment trends is shown by the report of the Sub-Committee on "Trends of the Investment Business," made October 13th, 1930, to the Investment Bankers' Association at its New Orleans convention. This report in part states:

"Based on the figures published by the Commercial and Financial Chronicle, to which we have freely referred, we find that in the first nine months of 1930 fixed obligations represented 70.6% of the total corporate financing, and stocks 29.4%, a startling reversal of the corresponding figures for the same period of 1929, which showed only 33% in fixed obligations and 67% in stocks. Certainly the trend in the current year is much nearer normal than in 1929. The record of eleven years suggests the ratio of 62.4% in fixed obligations and 37.6% in stock financing as an average expectation."

Much of the common stock financing of the year 1929, indeed $2,250,000,000.00, consisted of common stock investment financing and trading company issues, such as fixed trusts and management trusts. In these there has been a drop in the first nine months of 1930 of 90 percent, many of the so-called management trusts having apparently not been any too well managed. At the present time there is some off-set to the drop in investment company security financing in the current output of so-called fixed trusts, in which the management has either no discretion or very little discretion in the securities in which it will invest, this being another evidence of the present trend toward greater conservatism in investment, as is the increased favor shown to high grade preferred stocks.

An important, although not a consciously recognized factor in the ultimate preference of investors, will be the trend in the purchasing power of the dollar. In a period of rising prices, when the dollar becomes less valuable, fixed incomes are at a disadvantage, whereas in a period of falling prices, during which the dollar becomes more valuable, fixed incomes are at a great advantage. Accordingly, the popularity of bonds and preferred stocks which carry a fixed income, inevitably depends in a large measure upon the purchasing power of the income which they carry. Rising and falling prices, on the other hand, do not so markedly affect common stocks, because as prices rise, corporate earnings and dividends have a tendency to rise with them, so that the yield on common stocks more nearly keeps pace with fluctuating money values.

The reason, for instance, why bonds lost favor during and for a brief period after the war, and why convertible preferred stocks carrying a high dividend rate, and common stocks, particularly Class A common stocks, participating fully with Class B common stocks in earnings but having a priority over them in dividends, came into favor, was because many investors found their fixed incomes dwindling in purchasing power and felt the need of a higher yield on their investments. They naturally wanted some share in the bounteous war and post-war common stock profits, especially as they realized that in case an issuing corporation got into financial difficulties, its bonds and debentures by no means always paid out in full, that preferred stocks paid out not at all, and that in reorganizations, where the capital structure of the corporation was readjusted, preferred stocks rarely fared better than common stocks.

Gradually it began to dawn upon them, moreover, that in taking fixed income securities they were gambling on the purchasing power of the dollar, and that this gamble made what they thought were conservative investments, far from conservative. The fact is that most of us believe in the fetish that because our gold dollar always consists of 23.22 grains of pure gold, it is a stable dollar, when as a matter of fact, on the basis of a purchasing value of 100c for the gold dollar in 1896, it was worth and had a purchasing power of 77c in 1904, 65c in 1912, 53c in 1916, and 27c in May, 1920. In other words, an investor who had paid $1,000 for a first grade twenty-five year Thousand Dollar bond in 1895, and to whom a thousand gold dollars were repaid by the issuing company in 1920, at the maturity of the bond, got back in purchasing equivalent really about what $270 would have bought him in 1895. On what most conservative bankers regarded as an investment for trusts and widows and institutions, he had, in the course of twenty-five years, really lost on his principal 73 per cent, although the bond had really been repaid to him supposedly in full.

So great is this shift in the producing power of the dollar from time to time, that some years ago in an address delivered before the Cleveland Real Estate Board I suggested, in line with some of Professor Irving Fisher's ideas, that insurance policies, ninety-nine year leases, long-time bonds and like securities be payable not in a fixed number of gold dollars, but in such quantity of gold coin or other lawful money of the United States as, according to the Index Number of Wholesale Prices for the United States of all commodities last published by the United States Bureau of Labor Statistics before such payment is due (or if not paid when due, before such payment is made), shall have a purchasing power equivalent to a specified number of dollars at the time the lease, bond issue or insurance policy is drawn; that, for instance, if a $10,000 insurance policy is taken out in November, 1930, and the insured dies in 1940, his widow will receive what $10,000 would have bought in 1930 and not either one-half as much, or one-third as much, or maybe twice as much in purchasing power, as is the case now.

If the statement which Professor E. F. Gay, of Harvard, is reported to have made to the Institute of Politics at Williamstown on August 9th last is correct, namely that "the world is faced with a long downward movement on commodity prices," then it is exceedingly likely that fixed income securities may come into increased favor. On the other hand, it is not at all unlikely, whether commodity prices go up or down, that the trend may be toward fixed income securities which are convertible into common stock or carry purchase warrants as an incident to them. Probably corporations will prefer to make their fixed securities, whether preferred stocks or bonds, convertible, rather than to issue purchase warrants for common stocks with them—this for the reason, first, that where the fixed securities are convertible into common stock, the outstanding securities of the corporation on which income must be paid are not increased, whereas if they carry purchase warrants, the exercise of the purchase right increases the corporation's securities; and second, that the purchase is made at a time when the corporation is most prosperous and when it is least in need of money. Corporations that issue purchase warrants with their fixed income securities will probably, moreover, prefer to make those warrants non-detachable, because where they are detachable they are frequently detached and sold, with the result that the general value of the bonds or debentures with which they are given is depressed and the credit of the issuing corporation thereby impaired.

Accordingly, one of the important factors to be considered in determining the type of securities to be issued, is the particular trend of the investment market, i. e., the fashion currently prevailing for investments.

Sixth: Another factor which frequently determines the form of the financial set-up, is the desire of the organizers of the enterprise to retain control, and often, to retain the right to exceptional earnings of the enterprise. Very frequently promoters and bankers seek the public's capital more than they do the public's control or partnership in management, and so the financial plan is worked out to guarantee a sufficiency of the public's money without at the same time jeopardizing control, this being accomplished either by giving the common stock sole voting power, making the issue small and having this retained by the insiders, or by making the common stock issues so large that the proportion retained by the insiders exceeds the preferred issue and the common stock bonus distributed to the public, this latter policy being employed by many public utility corporations. The desire to retain control has been one of the most potent causes of the growth of holding companies during the last fifteen or twenty years, and one of the chief reasons for the complex capital and financial structure of many corporations.

. . . .

I shall now enter briefly into a discussion of various elements to be considered in connection with the two main types of securities—namely, common stocks and preferred stocks.

There are two types of common stock, differing in the extent of their ownership of the corporate enterprise. One type stands for the entire property of the enterprise, the stockholders owning everything and there being no preferred shares, bonds, short term notes, debentures or other securities. The other type represents the right to assets and earnings after the claims of prior security holders, i. e., preferred stock, bond, debenture and mortgage holders, have been satisfied. The simple financial structure, with stock alone, is still used by most small manufacturing and mercantile corporations and some old line manufacturing and utility companies. It is practically always used by banks, trust companies and insurance companies, where the capital stock is under the law an inviolable fund for creditors.

Originally, American railroad financing was limited to common stocks, but gradually it has shifted from common stocks to stock and mortgage bonds, then to common stock and a wide variety of preferred stocks and a wide variety of bonds, covering the simple mortgage bond and the more complex non-cumulative income bond, with the result that today in railroad, light and power, and manufacturing businesses, the simple common stock representing the entire business, has been more or less superseded by common stock representing residual equities. This has resulted in the somewhat anomalous situation that clever financiers through acquisition of a comparatively small amount of common stock have been able to gain control over the destinies of prior securities many times more valuable than the entire common stock itself, especially in the case of railroads and public utilities, in the latter of which a most intricate system of holding companies, involving intercorporate superposition of one corporation over another, has been developed. Under this system the operating local public utility subsidiaries have had the advantage of the superior engineering, technical, research, managerial, credit, security marketing, and quantity purchasing facilities of the holding company, as also the use and interchange of power station and other facilities with its subsidiaries and the utilization of its more skillful technique in dealing with public officials and the public generally. The holding company, in turn, by reason of its more extended operations, has been able to command much finer technical and executive talent than its subsidiaries, has

been able to enter upon extensive research, which no one of its subsidiaries acting alone could afford, and by distributing the business over large territories—thereby averaging the risk and relieving itself of the danger, from franchise revocations and like purely local causes, of the irreparable damage which often confronts purely local utilities—has been able to develop a much more attractive investment security and a much wider market therefor than could the purely local companies. This, in turn, has enabled it to secure money on favorable terms for far-reaching extensions and improvements, which money might otherwise never have been obtainable.

Originally, of course, all common stock had a par value. However, within recent years most common stock financing has been with non-par stock. Within the last few years, too, there have been different classes of common stock, as, for instance, Class A and Class B common stocks, or preferred common and ordinary common stocks, the A or preferred common shares having in relation to the B or deferred common shares, many of the characteristics, limitations, preferences and safeguards of the old-time preferred, the main distinction being that instead of the preferred shares having a par value, they have no par value.

In this connection I want to make just one or two suggestions with respect to the issuance of no par shares. First of all I want to point out that the mere fact that the charter of a corporation or state statutes give its Board of Directors or a majority of the shareholders the right to issue no par shares for such considerations as they may deem best, will not prevent courts of equity from intervening on application of existing shareholders to enjoin a dilution of their shares by the issuance of new shares by the Board or shareholders clearly below their real value, and that where no par shares are issued below real value, there is danger that the courts may order the shareholders to whom the no par stock was issued below value to pay into the treasury of the company an additional amount to equalize their cost for the shares to that of other shareholders. See *Hodgeman vs. Atlantic Refining Co.*, 300 Fed. 590; also *Stone vs. Young*, 206 N. Y. Sup. 95, both decided in 1924.

I want further to suggest that where a par or no par corporation has a surplus which it desires to keep in whole or in part available for dividend payments, and it wants to convert its par shares or no par shares into no par shares of the same or a new corporation, or wants to merge its assets with those of a new corporation in exchange for the latter's no par shares, it should be clearly stated in the Resolutions and set-up on the corporate books exactly what part of the money, shares or other considerations turned in for the non-par shares is intended to be capital from which dividends cannot be paid, and what part is to be deemed surplus, available for the payment of dividends. Unless such careful segregation is made, all the consideration paid in for the non-par shares, including previous surplus, will under the laws of many states be frozen into the capital back of the non-par shares issued on the reorganization or merger, and cease to be available for dividend distribution.

So much for common stocks.

Preferred stocks are of course of innumerable varieties. Sometimes a corporation has as many as half a dozen different classes of preferred shares, with varying asset, dividend, voting and other rights among themselves. Some preferreds have equal voting rights with the common, share for share, some are non-voting, except as required by statute or in case of default in dividend payments or performance of certain corporate obligations, in which event they are given either all or partial voting rights; some preferreds are cumulative as to their entire dividend, some as to part of their dividend, and some entirely non-cumulative; some are limited in their earning participation to their preferred dividend, and some, after they receive their preferred dividend, participate either equally or to a certain extent with the common; some are convertible into common stock as a matter of right at the option of the holder, sometimes on a uniform basis and sometimes on a basis stepped up as time goes on; some have warrants for the purchase of common stocks attached to them; some are redeemable pro rata or by lot, at the option of the company, also either at a uniform price or at a price varying with the length of time the stock has been outstanding; some provide for priority in distribution of assets on dissolution or liquidation, different liquidation rights being provided where the liquidation is voluntary and where it is involuntary; some provide for the establishment of a sinking fund, based on certain percentage of earnings, to be used in the purchase or redemption of the preferred stock; some restrict the amount of dividends which may be paid on the common stock until all the preferred stock has been retired or else until certain sinking fund requirements have been fulfilled; some provide for subscription rights to new issues of stock and to bonds or securities convertible into stock; some for the maintenance of consolidated net quick assets or consolidated net tangible assets or consolidated net assets at a certain per cent of the aggregate amount of preferred outstanding; some provide that no preferred issue having priority over or standing on a parity with the authorized preferred shall be authorized or issued, and no mortgage or lien on the company's property be created or assumed, except purchase money mortgages for not exceeding a certain per cent of the purchase price of the property acquired, and no indebtedness maturing more than one year from the date thereof, other than indebtedness secured by liens on property acquired existing at the time of acquisition, created, guaranteed or assumed without the consent of a certain per cent of the preferred stock outstanding; some provide that no shares on parity with or in priority to the authorized preferred shall be issued unless the consolidated net income of the corporation and its subsidiaries for a certain period of time preceding the date of issue shall have borne a certain relation to the dividend requirements on the outstanding preferred and the preferred proposed to be issued, and unless the consolidated net assets of the corporation and its subsidiaries, including the consideration received for the additional shares, shall bear a certain relation to the liquidation price; some provide for the application of the proceeds from the sale of plants or real estate to the redemption of the preferred stock. These are the most usual provisions. There are, of course, any number of others, and many variations of the above.

It is, of course, utterly impossible to discuss

these provisions, or even any of them, in detail, as each one of them admits of very extended discussion. There are, however, a few considerations, which will of necessity be very sketchy and disjointed, to which I should like to call special attention.

First of all, it is to be borne in mind that a preferred stock is primarily a stock, and that unless the charter clearly limits the dividend, liquidation and voting rights, the preferred stock is likely to be held to have the same voting, dividend and liquidation rights as the common shares. For example, simply to state in the charter that the preferred stockholders shall be entitled to receive a cumulative dividend at the rate of 7 per cent per annum before any dividends are paid or set aside on the common stock, would in all probability permit the preferred stock, after the common stock has received its 7 per cent, to share equally with the common above that point. The same thing would probably, though less certainly, be true where the wording is that "the preferred stockholders shall be entitled to receive a cumulative dividend at the rate of 7 per cent per annum and no more before any dividends are paid on the common stock," as even in this case there is no definite limitation on the amount of dividends which the preferred stock is to receive, but only on the amount which it is to receive before dividends are paid on the common stock. Accordingly, there should be added to the above some clause to the effect that the holders of the preferred stock shall have no rights by reason of their ownership thereof to share in any distribution of the profits or assets of the company, whether in the form of cash, stock dividend or otherwise, except to the extent specifically provided in the charter.

In connection with this matter of dividend rights of preferred shares, I want to point out the importance of expressing very clearly just what the rights of the preferred shareholders to dividends are to be if the preferred dividend is not to be cumulative. Within the last few years various decisions have been rendered which really made par preferred stocks, expressly stipulated by the charter to be non-cumulative, cumulative to a certain extent, where the charter did not indicate a contrary intent beyond any possible question. These decisions are as follows: *Day vs. United States Cast Iron Pipe & Foundry Co.*, 126 Atl. 302 (Court of Errors and Appeals, N. J. 1924); *Collins vs. Portland Electric Power Co.*, 12 Fed. 2nd 671 (U. S. Circ. Court of Appeals, 9th Circ., 1926).

In the United States Cast Iron Pipe case it appeared that preferred dividends had not been paid for several years, although the same had been earned. In 1922 a dividend of 7 per cent on the non-cumulative preferred stock was earned and paid, and a dividend then declared on the common *out of surplus earnings accumulated in the years in which no dividend on the non-cumulative preferred had been paid.* In an action brought by a preferred shareholder to enjoin the payment of the dividend on the common, the Court granted the injunction, and held that no dividends could be declared on the common until the earnings of prior years, which might have been declared as dividends on the preferred stock but were not so declared, had been distributed as dividends on the preferred for such prior years. In other words, the Court made preferred shares which were expressly declared by the charter to be non-cumulative, cumulative to the extent of earnings up to the preferential rate made in years in which no dividend had been declared on the non-cumulative preferred. The Court in effect held that a corporation was required to carry two separate surplus accounts, one available for preferred dividends, and one available for common dividends, and that dividends could not be paid on either stock out of surplus set apart for the other stock; in other words, that earnings made in any year up to the non-cumulative dividend payable on the preferred for such year, could at no time be declared on anything but the preferred stock, and that earnings of any year in excess of the preferred dividend requirements for such year could be declared only on the common stock.

A contrary holding was made by the United States Supreme Court on January 6th of this year, in the case of *Wabash Railway Co. vs. Barclay*, 280 U. S. 197. In this case the Supreme Court, reversing the Court of Appeals, held in its syllabus as follows:

"When the net profits of a corporation out of which a dividend might have been declared for the preferred stock, are justifiably applied by the directors to capital improvements, the claim of the stock for that year is gone, if by the terms of the articles of incorporation and the certificates, the preferential dividends are not to be cumulative. The fact that there were profits in that year out of which dividends might have been (but were not) declared, does not entitle such stock to a correspondingly greater preference over other stock when the profits of a later year are to be divided."

It is to be noted, however, that this decision assumes that the net profits out of which a dividend might have been declared on the preferred stock were *justifiably* applied by the directors to capital improvements. Whether the court would have come to the same conclusion where a wise administration of the corporation would not have required the application of the earnings to capital improvements or the operation of the company, is not certain. In any event, it is well to make perfectly clear, if that is desired, that the discretion of the Board in the matter of dividend declarations on the non-cumulative preferred is to be absolute, and that if the preferred dividend has been earned in any year but has not been paid in such year, the right to receive the same has been lost forever.

Occasionally corporations prefer not to make their stocks cumulative from the time of issue, but only from the time that the corporation has been in operation for a year or two—this so as not to saddle upon the corporation arrearages in dividends, almost inevitable in the initial years, which must be paid before the common stock begins to share in the profits.

And while I am on this subject of dividends, I wish to suggest the advisability of providing in the charter that dividends be declarable out of any assets from which dividends are lawfully declarable under the statutes, and not out of some specific fund like surplus or net profits arising out of the business. Today, for instance, the law permits payment of dividends out of paid in surplus, but many companies are unable to pay dividends out of such paid-in surplus because their charters specifically provide for the payment of dividends solely out of surplus or net profit, from which dividends were alone payable under the old law.

Unless the charter provides that the preferred shares are to have preference in the distribution of assets on liquidation, dissolution or winding up of the business, the preferred shares will only share ratably with common shares. On the other hand, even if the charter specifically provides that the preferred shares shall be entitled to a certain sum, for example $50.00 plus unpaid accrued dividends on dissolution, liquidation or winding up, in priority to the common, this would not preclude the preferred from sharing in the assets of the corporation ratably, share for share, with the common after the common has received an amount equal to the liquidation preference accorded the preferred, unless the charter specifically negatives such participation right. Thus, if a corporation has 1,000 shares of no par preferred, entitled on liquidation to receive $50 per share in priority to the common, and it has 1,000 shares of no par common, and the net worth of the corporation is $500,000.00, the no par preferred shares would, on liquidation, first get $50 per share, then the no par common would get $50 per share, and thereafter the remaining assets, or $400,000, would be divided ratably among the preference and common shares, i. e., both common and preference shares would receive on liquidation $250 per share.

In connection with the liquidation clause it is often well to provide that the liquidation clause shall not be deemed to require any payment to or distribution of assets among the preferred stockholders in the event of a consolidation, merger, lease or sale which does not in fact result in the liquidation and winding up of the enterprise, if the terms of the consolidation, merger, lease or sale make other provisions for the preferred stock and are consented to by the holders of a certain per cent in amount of the then issued and outstanding preferred. Such a clause would not deprive the preferred shareholders of any rights given them to receive the fair value of their shares on such action being taken if they protest against such action, but would prevent them from getting the liquidation price, which might be very much higher than the fair value of the shares.

Indeed, in view of the vicissitudes of business and the unforeseen contingencies that arise in the management of corporations, it is often well to provide in the charter that the provisions of the preferred stock may be altered in any respect or the operation of any of its provisions suspended either for a time or entirely, if a certain large percent of the outstanding preferred shares consent thereto.

In connection with convertible preferred shares, or preferred shares having attached thereto purchase warrants, care should be exercised properly to safe-guard and protect against dilution of the purchase or conversion rights in cases of stock dividends, stock split-ups, exchanges of stock, reorganizations, etc.

It is often well to authorize a larger issue of preferred stock than may be immediately necessary, one which will be sufficient to cover the probable needs of the corporation for a reasonable time to come, thereby avoiding the necessity of calling stockholders' meetings to authorize the new preferred. It is well also to provide in the charter that the Board of Directors may issue the preferred so authorized from time to time in series, on such bases as to dividend rights, redemption and liquidation prices, etc., as the Board might at the time of such issue deem best. Such flexible authority of the Board would make it possible to adjust the dividend rate, the redemption price and the liquidation price so as to take into account the conditions of the money market and the general popularity or lack of popularity of preferred stocks at the time the preferred stock is issued.

The clause giving the corporation the right to redeem preferred stock generally provides that it must be done either on a dividend paying date or upon sixty or possibly thirty days' notice. It sometimes happens, however, that a corporation is anxious *prior to the redemption date* to take certain action, such as issuing bonds, notes or other securities, which, under the charter, it cannot take without the consent of the preferred stock, when it is ready and willing prior to the redemption date to redeem the outstanding preferred and to deposit the necessary redemption fund, including dividends to the redemption date specified, in a Trust Company for that purpose. To meet such a situation and so as to avoid the necessity of getting the consent of the preferred stock, where it is about to be redeemed, the charter should provide that if the preferred stock has been called for redemption and the redemption price, inclusive of the dividends to the redemption date, is deposited in a bank or trust company solely for purposes of redemption, prior to the redemption date, the rights of the preferred stock as stockholders, other than to receive the redemption price, should cease and determine from the time of such deposit.

The charter should further provide that the consent of the preferred should not be necessary to amend the charter so as to *authorize* certain securities, where the charter also provides that such newly authorized securities may not be *issued* until after redemption of the preferred stock. This provision will make it possible practically simultaneously with the issuance of the new securities to apply the proceeds of the issuance thereof toward redemption of the preferred stock, and thus avoid the necessity of getting consent of a preferred to such issuance when such preferred is about to be retired.

Of course a redemption price is practically always anywhere from two to ten per cent, or even more, above the par or original cost of a preferred share. However, occasionally preference shares, and particularly no par preference shares, have provided a very high redemption or liquidation price as compared to their par or original sale price. Such a high liquidation or redemption price should be avoided, because it may block an advantageous merger, consolidation, refinancing or reorganization, because of the excessive cost of retiring the preferred.

Sometimes the sinking fund provisions of preferred stocks are similarly disadvantageous to the corporation, in that they obligate it to set aside certain percentages of the earnings of the company for redemption or purchase of the preferred under circumstances when this money could be used to very much better advantage in expanding the business of the company, or for necessary corporate purposes. Instead of absolutely obligating the company to set aside a certain portion of the earnings and applying them toward the redemption or purchase of the preferred, it is often better simply to provide that

no dividends shall be paid on the common stock until preferred stock in an amount bearing a certain relation to prior earnings, or to the total authorized preferred, shall have been retired. By this means the preferred stock is assured that surplus funds that should be used for redemption of preferred will not be absorbed in dividends on the common stock. On the other hand, the corporation is permitted to use the earnings for its operations, if this is deemed advantageous to the company.

The same criticism might be made of those provisions in a charter which absolutely obligate the company to maintain certain ratios between the outstanding preferred and net assets, net liquid assets, tangible assets and like items. The maintenance of such ratios might be absolutely impossible or even subversive of the best interests of the corporation under certain circumstances, and instead of embodying those provisions which make it possible for a preferred stockholder as a matter of contractual right, upon default in their fulfillment to ask for a receiver of or otherwise harass the corporation, the charter should simply provide that the corporation should not be able to declare dividends on the common stock unless the ratios referred to exist.

At times, as a result of careless draftsmanship, the charter provides that a sinking fund shall be set aside annually and applied to the redemption of a certain proportion of the preferred stock, without providing that this sinking fund shall come wholly out of earnings. Such a provision really creates an obligation rather than a preferred stock, because it obligates the company to redeem a certain amount of preferred, and on failure so to do, the preferred stockholders could doubtless enforce their right, either through receivership or other procedure, though they undoubtedly could not do so at the expense of corporate creditors.

The charter provisions which require the consent of a specified percentage of preferred stock before certain action, such as issuing long time obligations or creating mortgages or authorizing new shares, can be taken, have often been found impractical, because of the difficulty of getting the affirmative consent to such action even though it is favored by the requisite number of preferred shareholders. Accordingly, it is often better to provide, not that consent of a certain percentage of the preferred stock, say seventy-five per cent, be required before the action is taken, but that the action may be taken unless a certain percentage of the preferred stock, say twenty-five per cent, objects to taking the same within a certain number of days after registered notice of the proposed action has been given them. In connection with this provision care should be taken to make it clear that preferred stockholders of only a specified record date are entitled to notice, and that objections from only these same stockholders may be counted toward the requisite percent of objections. Provision should also be made for the withdrawal of an objection by a preferred stockholder who has once registered an objection.

Where the charter provides that additional preferred stock on a parity with the existing preferred may be authorized or issued under certain conditions, it might be well to define exactly in what respects such new preferred may differ from existing preferred, e.g. as to liquidation rights, dividend rights, redemption rights, and still be deemed on a parity therewith for the purpose of such provision.

As has been stated before, preferred stock has equal voting rights share for share with common, unless the charter specifically provides otherwise. Accordingly, in the past preferred stock has frequently been made non-voting except in case of default in a certain number of dividends on preferred, in which case it has been given, during the period of such default, either equal voting rights share for share with the common, or a certain proportionate voting right as compared to the common, or entire voting rights to the exclusion of the common. Provisions giving the preferred shareholders voting rights on default have, however, in many cases been of little value.

On the other hand, in some cases where the preferred received complete voting rights, it voted to liquidate the business and to cash in on the preferred, wiping out the equity of the common in its entirety, rather than to permit the business to continue and take those business chances which have been so largely responsible for American business success. Accordingly, instead of giving the preferred stockholders either minority or controlling voting privileges during defaults in dividends, it has been suggested that they be given and permitted to retain permanently a certain proportion of the total common stock of the company, such proportion to vary as the default period increases, additional common shares being authorized, if necessary, for that purpose. This type of provision would seem to be eminently fair. When a stockholder buys preferred stock in a corporation which gives him a limited return on his investment and no participation in the larger speculative possibilities of the enterprise, he relies upon the management, which as a rule controls the common stock or is controlled by it, to safeguard his investment. So long as it is safe-guarded by the management, he has no cause for complaint that he has an investment limited in its earning capacity, because this investment is a prior security to the common stock. When, however, the management fails to safe-guard that investment and dividends thereon are defaulted, then the investment character of the preferred stock has been largely shattered by the management, and the preferred stock becomes a speculative security sharing in the risks of the business almost to the same extent as the common stock. This being so, and the preferred stockholder being compelled to participate in the gamble of the enterprise, whereas he originally limited his participation in the earnings of the company in the expectation that he would be free from such gamble, he should be permitted to participate in the larger success of the company, should such success in the future attend it.

The above suggestions as to corporate securities have of course been very fragmentary and disjointed, and you have doubtless noted that this discussion has dwelt quite as much on the business phases of corporate securities as on their legal phases. The reason is that today the business man expects his lawyer not only to safe-guard him with respect to the legal phases of his financial problems, but to advise him as to their practical business phases as well.

NATIONAL CONFERENCE ON UNIFORM AERONAUTIC LAWS

(*Continued from Page* 81)

sured. Permanence of those facilities which go to make up an up-to-date, fully-equipped and adequate airport, permanence of the airport as an area, are positively essential if we are to have any air commerce at all. Aeronautics is inherently transportation. It matters not whether aircraft be engaged in scheduled air transport, miscellaneous operations, or private flying, the fact remains that areonautics is transportation. Without a sufficient number of airports located advantageously with respect to the areas they serve, the prime advantages of air transportation are impeded. After all, airports are to aircraft what docks and harbors are to ships, rights-of-way and terminals are to trains, and streets and highways are to motor cars. Think how these modes of transportation would be hampered if they were unassured of the permanence of the harbors, terminals, and roads which they depend upon for their operation? . . .

"But somehow all municipalities must soon be impressed with the importance of acquiring suitable airport sites as early as possible. Such sites, sufficiently close to metropolitan centers to be fully effective, are rapidly becoming more difficult to find. It is a mistake to postpone acquisition of available tracts on the basis that commercially operated fields are now serving the needs of the community. The ground on which the commercial enterprise is located may become so valuable that the attraction offered by opportunities for profitable sales of the property for purposes other than aeronautics cannot be financially resisted. Such an occurrence would leave the city faced with the embarrassing problem of no airport at all, and no site available.

"Now as municipalities are coming to realize this obligation, they are frequently faced with restrictions in their charters, written before the dawn of the aeronautical era, making it difficult or impossible for them to acquire land for airports or to expend public funds for airport development and operation. The answer to this condition appears to lie in the enactment by the state legislatures of statutes which will enable political subdivisions of the state, separately or jointly, to acquire sites for, finance, develop, operate and police airpoirts. Such legislation should be uniform in character throughout the United States, to provide uniform encouragement of aviation, and to form a background for those uniform airport rules which we have heretofore discussed. They should include authority to acquire sites within or without the corporate limits of the political subdivision, to extend the police power of the political subdivision beyond those corporate limits for the enforcement of airport regulations, for acquisition by condemnation and/or excess condemnation proceedings where necessary, and for adoption of zoning ordinances where the sites are within the corporate limits of the acquiring political subdivision. . . .

"Everyone in the aviation industry recognizes the necessity of publicly owned and operated airports. What the industry must do is to educate the public on this need. There can be no emphasis too strong upon the fact that the future of aviation depends upon the creation of those permanent, properly regulated, extensive, adequately equipped, aviation fields which only the municipality can be expected to provide. In the task of convincing our municipal citizens of this inevitable fact, let appropriate state legislation not only lead, but light the way."

Inasmuch as the entire proceedings of the conference, addresses and full discussion, are now being made available through the federal department, the aim of the present report has been only to indicate the outstanding points covered in the contributions made by the various experts appearing on the program. The Washington conference was attended by the greatest number of state delegates present at any of the conferences on aeronautics yet held, and there is no doubt that its influence will be manifested in the forthcoming state regulatory legislation.

Washington Letter

(*Continued from Page* 118)

1910, c. 115.....Title 48, sec. 5
31 Stat. 328 sec. 17, Act of June 6, 1900, c. 786.....Title 48, sec. 28
31 Stat. 333, sec. 32, except the first two sentences, Act of June 6, 1900 c. 786, as amended by 33 Stat. 1266, sec. 2, Act of March 3, 1905, c. 1497 .....Title 48, sec. 42
33 Stat. 1266, sec. 3, Act of March 3, 1905, c. 1497.....Title 48, sec. 65
33 Stat. 391, Act of April 27, 1904, c. 1629 .....Title 48, secs. 331-337
40 Stat. 604, Act of June 13, 1918, c. 97 .....Title 48, sec. 618
25 Stat. 489, sec. 1, Act of September 22, 1888, c. 1028.....Title 50, sec. 11
26 Stat. 769, last paragraph, Act of February 24, 1891, c. 283.....Title 50, sec. 12
31 Stat. 910, second proviso, Act of March 2, 1901, c. 803.....Title 50, sec. 13
27 Stat. 461, proviso, Act of February 18, 1893, c. 136.....Title 50, sec. 14
25 Stat. 491 first two complete paragraphs, Act of September 22, 1888, c. 1028 .....Title 50, sec. 15

Sec. 2. Rights or liabilities existing under the foregoing statutes or parts thereof on the date of the enactment of this Act shall not be affected thereby."

Codification of Internal Revenue Laws

There has been submitted to the Joint Congressional Committee on Internal Revenue Taxation, by its staff, a codification of the laws of a permanent character in force December 1, 1930, relating exclusively to internal revenue. This work has been undertaken with the cooperation of Hon. Roy G. Fitzgerald, Chairman of the Committee on the Revision of the Laws, and the Treasury Department. Extreme care has been exercised to make this codification accurate and reliable, with the object in view of its ultimate enactment into absolute law as Title 26 of the Code of Laws of the United States. Chairman Hawley, of the Joint Committee, stated that the Joint Committee would be called together to consider the codification.

THE MULTIPLICITY OF LAWS

Amount of Output of Legislature Which Affects General Public Is Unduly Exaggerated —Time Required for Individual to Read Laws Which Touch Him—People Protest Against Laws When "a" Law Bothers Them

By Thomas S. Dabagh
Member of California Bar and Research Assistant in Legislation, University of California

IT is not improbable that in the original version of the Biblical story Adam was made to mutter something about "too darn many laws" as he and his mate were driven from the Garden of Eden. The reprobating of law-makers has been such a favorite sport for so long a time. However, it does seem that during the last few years the critics have been unusually vociferous, and the din greater than ever. Even learned members of the bench and bar have not hesitated to raise their voices in lament. It is undoubtedly the thing to do nowadays.

Many of the criticisms are really astonishingly naïve. "Statistics" are even offered: so many million laws on the books, and so many thousand added during the year. Why, no wonder there is no respect for law! But the prize goes to the journalist who diligently added some very queer estimates of the total number of the general laws in force enacted by the law-makers of a certain city and its State, and by Congress, and who solemnly assured his readers that the *local policeman* was responsible for the enforcement of all of these laws! As if all laws are penal, and as if they all have local application.

But where there is noise there must be something doing. Perhaps—and this is merely a suggestion—perhaps the explanation lies in the fact that folks protest against laws when *a* law bothers them.

As every reader of current newspapers and magazines well knows, articles and cartoons seek to give the impression that the statutes governing daily life comprise many volumes—so many that it would require more than one "five foot shelf" to hold them all. The fact is, of course, that the general statutes in force in any jurisdiction can be included in a very few volumes. To illustrate, the statutes as of January 1, 1930, which would be of general interest to the people living in New York City—in what is perhaps the most complex civilization which the world has ever known—could be found in eight volumes requiring less than eighteen inches of shelf space.

The volumes are the Code of Ordinances of the City of New York (1 volume); the Greater New York Charter (1 vol.); the Consolidated Laws of New York (1 vol. and 2 supplements); the Civil Practice laws of New York (1 vol.); the Code of Criminal Procedure and related laws of New York (1 vol.); and the Code of the Laws of the United States (1 vol.). All these volumes contain elaborate indexes, and the space required would be reduced by several inches if satisfactory unannotated editions of the Charter, the Civil Practice, and the Criminal Code volumes were available, and if there were a 1929 edition of the Consolidated Laws, eliminating the two supplementary volumes which consist principally of amendments and revisions of the material in the main volume.

Special enactments, which concern only particular persons, places, or things, are not included in this discussion, and it is not contended of course, that general statutes, or *laws*, constitute the whole body of *law*,—verily, there are also such things as administrative and judicial rules and decisions, many volumes of them. This discussion is concerned only with the amount of the output of the legislature which affects the general public, because that is what the criticisms so unfairly attack.

Now it would be interesting to know how much actual reading there is in these volumes of general statutes, some of which are printed in rather fine type, and on very thin paper. But first it should be said that he would be a fool or a student who would undertake to read all the general laws in force in his city, county, State, and nation. The most conscientious citizen need read but a fraction of the material to cover all that could be of personal interest to him, whether as bearing upon his rights and duties, or simply as a matter of general information. The "thou shalt nots," of course, would be only a portion of the total.

A careful computation indicates that the above mentioned fool or student, reading at the rate of three hundred words a minute (a medium pace), seven hours a day, would have to spend about forty-five days to read all the general laws in force as of January 1, 1930, passed by the New York City and State law makers, and by Congress. But a page by page examination reveals that the conscientious citizen (who, incidentally, is assumed to be married and to have children, and to be a real property owner, an income tax payer, a debtor or creditor, a motorist, a sportsman, a potential crook and assaulter and what not, and also a very inquisitive fellow) could read his share of those same statutes in about six days, plus an hour or at most five hours for the statutes governing his particular trade, business, or professional interests, and another hour or less for his other special interests. *Les Miserables* would require about four and a half days to read at the same pace.

Grouping the figures according to jurisdictions, there would be three hours and thirty minutes' reading of general interest in the statutes of purely local concern in New York City; thirty hours and forty minutes in New York State statutes; and eight hours and thirty minutes in Federal statutes. To such a mole-hill shrinks the mountain of the critics.

It will be appreciated that no arbitrary classifications were made to reduce the amount of reading

of "general interest," when it is pointed out that five hours of the time is for reading in tax laws, and another five hours is devoted to other property laws. Nine hours is allowed for the complete reading of the two criminal codes (State and Federal), although these contain many provisions of no possible concern to the general citizen. The material considered as not of "general interest" consists principally of the details of governmental organizations and operations, and the rules controlling particular businesses.

The "facts" in the case: The Code of Ordinances of the City of New York is devoted largely to the rules governing certain local businesses. The longest chapters are the Building Code, Electrical Control, Explosives and Hazardous Trades, Licenses, the Sanitary Code, and Streets. There is about fifty-five minutes' reading of interest to the general citizen in this volume, scattered in eleven chapters. About eighteen hours would be required to read the entire volume.

The Greater New York Charter is primarily concerned with the organization and operation of the City government. Two hours and thirty-five minutes' reading would cover the material of general interest, one hour of which would be in the chapter on Taxes and Assessments. The entire Charter text could be read in seventeen hours.

The Consolidated Laws volume with its two supplements, considered for present purposes as an integrated unit, would require about one hundred thirty-five hours and thirty minutes for a complete reading, but twenty-five hours would be sufficient to read the material of general interest. The longest chapters are the Agriculture and Markets, Banking, Conservation, County, Education, Election, Highway, Insurance, Judiciary, Penal, Public Health, Real Property, Tax, Town, and Village laws. The reading matter of general interest would include the whole of the State Constitution (one hour), and the whole of the Debtor and Creditor, Decedent Estate, Domestic Relations, Negotiable Instruments (about forty-five minutes each for these four), Penal (six hours and twenty minutes), Personal Property (one hour and thirty minutes), Real Property (three hours), and State Departments (one hour) laws, and portions of the Conservation (forty-five minutes), Education (thirty minutes), Insurance (thirty minutes), Mental Hygiene (thirty-five minutes), Public Health (thirty minutes), Tax (two hours), and Vehicle and Traffic (one hour) laws, with the balance of the time (about three hours) being devoted to over a dozen other laws.

The Civil Practice laws contain about three hours of reading of general interest, although it would take some twenty-one hours and forty-five minutes to read them completely. The Criminal Procedure volume has two hours and forty minutes of reading of general interest, while to read the whole of the laws would require something like eight hours and fifty minutes. The laws in both of these volumes of course relate principally to practice before the various courts.

The Code of the Laws of the United States has fifty titles or chapters. The longest are on the Army, Banks and Banking, Conservation, Customs Duties, Internal Revenue, the Judicial Code and Judiciary, the Navy, Public Lands, Shipping, and Territories and Insular Possessions. The total reading time would be one hundred and fourteen hours and thirty minutes. The material of general interest, however, could be read in eight hours and thirty minutes. This would include the whole of the Declaration of Independence and the Articles of Confederation (which, of course, are not laws), the Constitution, and the Criminal Code (which requires two hours and forty minutes), and portions of the Aliens and Citizenship (thirty minutes), Bankruptcy (thirty minutes), Internal Revenue (income and estate taxes, etc., one hour and thirty minutes), and Transportation (thirty minutes) titles. The rest of the reading time would be scattered in small doses through eighteen titles.

As for counting laws,—surely it must be obvious that it just can't be done. Laws are not definite and comparable units. A statute passed by a legislature may be about a detail, a whole subject, or a complete code; it may be a repeal, a compilation, an amendment or a revision, or it may consist of entirely new material; and of course it may be just a special law or an appropriation. What possible meaning, then, can a count of enactments have? Or taking the general laws in force as a basis: shall the count be of code, or chapters, or sections, or subsections, or paragraphs, or sentences, or clauses? But most important is the fact that a single clause may have far more significance than pages and pages of other material. Ants and apples and automobiles can't be added together.

Instead of attempting to count laws, the critics should indulge in some painstaking examinations of the statutes, to point out the specific laws which are "too many,"—in other words, the bad laws, for there can't be too many good laws.

In fact, we always need more laws. As social interdependence shifts and grows more complex, more and more laws become absolutely necessary. New devices are constantly developed, and regulation is required: yesterday the radio was invented; the day before, the aeroplane; tomorrow——? Then too, our group conscience changes as time goes on; not long ago we could see nothing wrong in slavery, while now we seek better child labor laws. And since we lack infallible foresight, we have to experiment in our legislation; enacting, amending, repealing, re-enacting. Our legal structure having been built piecemeal, over a long period of time, and by all manner of architects and laborers, we need to remodel it to suit modern ideas of design and construction, adding here and there, and eliminating the decayed, the superfluous, the freakish, and the obstructive; perhaps even reenforcing the foundations and reconstructing parts of the framework itself. Oh, yes, there ought to be a law. . . .

Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

THE ADMINISTRATIVE LAW OF FRANCE

By Hon. Pierre Crabitès
Judge of the Mixed Tribunal, Cairo, Egypt

SOME months ago this Journal published a paper by me entitled "The French Bench from Within." I there sought to draw a general picture of the judicial system of France. I did not, however, impinge upon the Domain of *"Droit Administratif."* I felt that that subject lay beyond the purview of my enquiry. But, I have just finished reading "The New Despotism" by Lord Chief Justice Hewart. In this work the eminent author makes a passing reference to French *droit administratif*. He has thus furnished me with a subject upon which I should like to write a few lines.

The Lord Chief Justice says that "happily there is no English equivalent for *'droit administratif.'*" He proceeds, nevertheless, to refer to it as administrative law. I see no reason why I should not adopt this translation. And yet, perhaps, I should not do so. The whole idea of *droit administratif* is so foreign to American conceptions that it would serve to emphasize this radical cleavage were I to adhere to the French term.

In other words, the genius of Napoleon not only gave to France all of her codes, but it fastened upon her body politic a Civil Service so highly centralized, so well administered and so self-contained as to constitute what Americans with a smattering of Latin, would be tempted to call an *imperium in imperio*.

The choice of such a description would be most happy because it stresses the point that the administrative machinery of the French State escapes from the control of the judicial system of France. It is this principle which this article will seek to make clear. If, therefore, the use of three Latin words will nail this idea to the masthead of this paper my task will be materially simplified.

The leading text-book upon the *droit administratif* of France is probably that of M. Bertélemy, the Dean of the *Faculté de Droit* of Paris. The distinguished professor looks at this entire problem from a point of view so foreign to American conceptions that he writes that:

"It is abnormal and contrary to our ideas of *l'administration* and of justice to admit that the judicial authority is called upon to solve difficulties which may arise in connection with the public service." And he goes on to say something to this effect:

"In an action at law between two private citizens one sees two litigants who invoke rights and upon which they ask the Courts to pass. But the average *procès administratif* (administrative law suit) does not disclose two adverse parties which lay claim to opposing rights. *'L'administration'* does not seek to exercise a right which can be urged against a tax payer. *'L'administration'* does not defend a right. It merely carries out a function."

I prefer to give the French text of the last three sentences. They are so eminently Gallic in their essence that I find it impossible to put them into idiomatic English. Here are the exact words:

"L'Administration ne prétend pas exercer un droit opposable à l'administré. Ce n'est pas un droit qu'elle défend, c'est une fonction qu'elle remplit."

After having thus spoken M. Berthélemy proceeds to explain that:

An administrative law suit bears no analogy to a civil action at law. It should rather be likened to a criminal appeal.

This means that if a Frenchman is not satisfied with an order issued, let us say, by the Public Works Department, he is not bound by the decision which he considers improper but his right of appeal is not to the Courts of his Country but to the hierarchical superiors of the offending official. The supreme authority in these matters is a quasi-judicial body, or more accurately speaking, an "administrative court" known as the *Conseil d'Etat* or Council of State—if one insists upon a translation which does not translate.

The theory back of all this is that a good judge may be a bad administrator and that questions affecting the public welfare should be passed upon by specialists who understand the problems submitted to them and not by judges who are trained in another school. I hesitate to quote Berthélemy too often but here is what he says:

"The qualities which go to make a good administrator differ radically from those which form an ideal judge. Energy, activity, clearness of vision, ability, promptness in taking a decision, and firmness in issuing orders are the dominant virtues which stamp the high grade administrator. A judge, on the other hand, should be wise rather than forceful and able. It is of secondary importance whether he be or be not active and energetic. His dominant attributes should be integrity, impartiality, maturity of judgment and freedom from passion."

All of this reads like Sanscrit to American eyes. I am not speaking to justify the French thesis. It has a great deal to recommend it. I am merely endeavoring to drive home the idea that the Gaul is essentially logical and that he is working, without deviation, towards an objective which fits in admirably with his mentality.

There are, obviously, many cases where it is difficult to decide as to whether an "administrative" question or a "judicial" question is at issue. To exemplify this distinction would carry me far afield. I shall assume that this statement is too evident to require proof.

The French meet this difficulty in a manner which, in its unbending logic, is typically French. They do not vest in a supreme judicial or administrative authority that final decision which, in case of a conflict between our State and Federal courts, American law confers upon the Supreme Court of the United States, that is to say, upon one of the two contending jurisdictions. Frenchmen say that the Courts and the administrative machinery are separate and distinct institutions, each paramount in its own sphere. They, therefore, see no reason why the one should bow to the other as all of the American State Courts do to the Supreme Court of the United States. They have, ac-

cordingly, created a *Tribunal des Conflits* or Conflict-Court which is neither judicial nor administrative.

Its composition bears witness to the logical turn of mind characteristic of Frenchmen. This Conflict-Court consists of nine members. Three are elected from among themselves by the justices of the Court of Cassation, which is the highest judicial Court in France. Three are chosen by the Council of State from among the Counsellors of State, the *Conseil d'Etat* being the highest rung of the administrative ladder. Two more referees are selected by the above named six. One of them is usually a justice of the Court of Cassation, and the other a Counsellor of State. The Minister of Justice, a Cabinet Officer who is neither a judge nor an administrator, is *ex officio* President of the Conflict-Court.

A public official is not answerable to any Court, not even to an Administrative Court, for what is regarded as an act of State, however unjustifiable his conduct may have been according to the ordinary canons of justice. Agents of the Government are exempt from punishment for any act of interference with the liberty or rights of citizens, if the act was performed in obedience to the orders of a superior. On the other hand, damages may be recovered from the State itself, through the Council of State, for unlawful acts of agents of the Government. A strong and virile jurisprudence is now fast taking shape which is putting more and more teeth into the jaw of the *Conseil d'Etat*.

It is extremely interesting to follow the evolution of this jurisprudence. There is nothing arbitrary about it. It constitutes a "rule of law." Procedure and precedent there count for practically as much as they do in the Courts of the French judicial system. But, even if all of these safeguards are thrown around the decisions of the *Conseil d'Etat*, and even if the impartiality of that body be as unassailable as it is, this segregation of the administrative machinery of France from the general body politic is bound to strike Americans as being something anomalous.

All of this means that we must get out of our shell and remember that French civilization differs radically from ours and that it is not necessarily inferior to ours. French procedure is admirably suited to the genius of France. It is not meant to be an universal panacea. Why should we flatter ourselves that our practice is so perfect that it should be applied everywhere? A well dressed man has his clothes made to fit his figure, not that of Apollo Belvedere. A well ordered State should have its laws patterned upon its own requirements and not upon those of an imaginary ideal Commonwealth.

THE REVISION AND CODIFICATION OF CRIMINAL PROCEDURE IN NORTH CAROLINA

BY ALBERT COATES
Professor of Criminal Law and Procedure, University of North Carolina

THE gradual development of procedural rules in criminal cases in North Carolina is recorded (1) in statutes scattered through the Session Laws from 1715 to 1929, (2) in decisions scattered through the Reports from Volume I in 1797 to Volume 199 now in the press, (3) in the practices of courts and officials which have not found their way into printed pages but which reflect no less the habitual processes of the law.

From time to time digests have been made of the decisions: by Iredell in 1839, Jones in 1854, Battle in 1866, Buzbee in 1880, Walser in 1899, Michie in 1916. From time to time compilations have been made of statutory changes with the judicial constructions placed upon them: The Revised Statutes in 1837, The Revised Code in 1854, Battle's Revisal in 1873, The Code in 1883, Pell's Revisal in 1905, Jerome's Criminal Code and Digest in 1916, The Consolidated Statutes in 1918, The North Carolina Code in 1927. The decisions represent the traditional common law as it has continued into the life of our time. The statutes represent merely patchwork changes in the common law made in scattered moments to meet obvious evils as they raised their heads. No comprehensive study of these decisions, these statutes, their relation to each other or to the unwritten practices of administrative officers, has yet been carried through. In short, no critical analysis of the theory and the practice of our criminal procedure has yet been made.

In 1848 the Field Code of Civil Procedure was completed. It furnished the basis for a complete codification and revision of civil procedure in North Carolina in 1868. In the spring of 1929 the American Law Institute completed its Model Code of Criminal Procedure. It is based upon an intensive study of the procedural systems in the different states of the union and the leading countries of the world, by a group of distinguished law teachers, judges and practitioners. It furnishes the basis for a complete codification and revision of criminal procedure in North Carolina today.

This work has been undertaken by the teacher of Criminal Law and Procedure in the Law School of the University of North Carolina together with a number of the younger members of the North Carolina Bar living in different parts of the state. Each lawyer is (1) studying one or more chapters of the Model Code in terms of its common law and statutory background, (2) tracing the North Carolina law bearing upon each section of his chapter as it has developed through our statutes and decisions from Colonial days to the present, (3) comparing its present status in detail with the provisions of the Model Code so as to point out the similarities and differences between them. As the first

draft of each chapter is completed it will be rotated among the lawyers who have been working on the other chapters and each chapter will then be rewritten in the light of the critcisms and suggestions of all who are associated in the work, and with the greater grasp derived from a study of the Code as a whole. As each chapter is rewritten it will be circulated among the Judges and Prosecuting Attorneys of the Supreme, Superior and Intermediate Courts for the invaluable criticisms and suggestions which can come from men daily engaged in the administration of criminal law.

In this way we hope to arrive at an accurate statement of the law and practice of criminal procedure in North Carolina—what it is, how it came to be what it is, and how it is working today. We are not stopping with collecting the statutes and decisions representing the 1930 North Carolina law on the many propositions promulgated by the Model Code and sprinkling them among the varied Code provisions. A single point in space points out no direction. Two points do. Three may show a zigzag. Twelve may plot a curve. So with the North Carolina law of 1930. But if we carry it back of 1930 to the days when it began to branch off from its English rootage, if we get the statutes and decisions struck off by our legislatures and our courts from that day to this, if we can read not only what is in the lines of statute and decision but what lies between them and so plot the tendencies and trends they chart,—if, in addition, we can clothe these skeleton lines with the uses that are made out of them and the practices which have grown up around them not yet dignified in formal law, if we can focus on the baffling puzzles honeycombing our criminal procedural problems today, the different viewpoints of different men from different sections with different practices, we can bring about a codification and a revision of our criminal procedure, eliminating technicalities where they exist, clarifying vaguenesses where they confuse, stimulating the law in its slow and often belated response to the ever quickening tempo and rhythm of our life. We can not only bring it, we can make it stick. We can do vastly more. We can build into North Carolina's legal tradition new attitudes and new values worthy of the high traditions of the North Carolina Bar.

The first drafts of the chapters dealing with (1) Arrests, (2) Methods of Prosecution, (3) Grand Jury, (4) Indictment and Information, (5) Arraignment, (6) Jurisdiction and Venue, (7) Change of Judge and Removal of Cause, (8) Waiver of Jury Trial, (9) Presence of Defendant, (10) Proceedings to Determine Mental Condition of Defendant, (11) Conduct of Jury after Cause Finally Submitted and Verdict, have been completed and are now ready for circulation. Substantial progress has been made on the first drafts of other chapters.

Three conferences have been thus far held in Chapel Hill to initiate this work and to discuss results as we have reached them. The first of these conferences was held in August, 1929, the second on September 26 and 27, 1930, the third on October 31 and November 1, 1930. Seventy or more lawyers, representing a range of territory reaching from Wilmington to Asheville and all ranks of the profession from beginning practitioners to the Attorney-General of the State and Justices of the Supreme Court attended these conferences. Thirty of them are actively participating in the research incident to the program. Through these lawyers we hope to carry the Code to local groups of interested lawyers and local bar associations throughout the State. It will be time enough for legislative consideration when through these sifting processes we have crystallized our thinking into a Code which may be made to mean as much to Criminal Procedure in this day as the Code of 1868 meant to Civil Procedure in its day.

Indiana

Indiana Bar Association Approves Non-Partisan Election of Judges and Exercise of Rule-Making Power by Supreme Court

The Indiana State Bar Association, at its mid-winter meeting last December in Indianapolis, adopted the recommendation of the State Crime Survey Commission for a non-partisan election of judges. The plan is for a separate ballot for judges, and for the names to be put thereon by petition.

The Association also approved another recommendation of the Crime Commission—to leave the rule-making power to the Supreme Court alone, but to appoint an advisory commission consisting of the Attorney-General, the Chairmen of the House and Senate Judiciary Committees, the President and Vice-President of the State Bar Association and two circuit judges to be selected by the Governor. There was quite a discussion before this recommendation was adopted. Two slightly variant plans were proposed and discussed and there was a certain amount of protest based on the idea that rule-making was a legislative function. But in the end the proposal, which was presented by former Judge Fred C. Gause of Indianapolis, was adopted.

The still unsolved question of admission to the Bar was taken up. "The lawyers appeared a unit in supporting a measure which would give the Supreme Court authority to admit applicants to practice law in Indiana," according to the report of the meeting in the *Indianapolis News* of Dec. 19. "This measure, drafted by Professor Gavit, and approved by the Bar Association at the summer meeting will comprise part of the lawyers' legislative program. It would, in brief, transfer authority from the lower courts to the high court. For years the lawyers have sought an amendment to the Constitution which would permit the legislature to fix qualifications for admission to the bar, but failing in that now have adopted the theory that the Supreme Court may exercise that authority on the ground that lawyers are in reality officers of the court."

At the banquet Mr. Samuel E. Garrison, of Indianapolis, outlined plans for the oratorical and essay contests which the Association will sponsor, and Prof. Sveinbjorn Johnson, counselor of the University of Illinois and former Chief Justice of the Supreme Court of North Dakota, spoke on "Procedural Reform." In the course of his address he said:

"I do not wish to be understood as exonerating the courts and the lawyers from all blame for the many blemishes upon the face of American justice, but I do wish emphatically to put a large share of the responsibility where it justly belongs, on the legislature itself, which with a tenacity more stubborn than enlightened, has insisted on keeping control where it had no capacity to control, and depriving experts of the right to control, where responsibility nevertheless was exacted."

Ohio

Cleveland Bar Executive Committee Adopts Resolution as to Judicial Candidacies

The Executive Committee of The Cleveland Bar Association, at a meeting which was held in the office of the President, Luther Day, went on record to the effect that a judge should not be a candidate for another judicial office except to succeed himself, unless he resigns. The Legislative Committee of the Association was authorized to prepare the necessary bill to give legal effect to this motion and to cause it to be introduced in the next session of the General Assembly.

In the course of the arguments for and against the motion, it was stated that if the policy was adopted it would prevent some good judges from aspiring to places on higher courts as a measure of reward for good service. It was stated, however, that the beneficial results of preventing the biennial turmoil that exists in the larger cities in judicial elections when several candidates of a lower court seek advancement to a higher court, would far outweigh the benefits of an occasional promotion that comes under the present system.

Another important action taken by the Executive Committee, according to President Day, was on the recommendation of the Committee on Judiciary and Legal Reform, that legislation be enacted to provide that in counties in the state having a population of 500,000 or more, the various terms of judicial office be given a particular designation. This recommendation was adopted by the Executive Committee. If this legislation is enacted, it will mean that at a certain time the sixteen Common Pleas judgeships in Cuyahoga County would be numbered from one to sixteen inclusive, and would be placed on the ballot as "Term No. 1," "Term No. 2," "Term No. 3," etc. It was pointed out that if the bill should be passed a judge who has made an outstanding record probably would be unopposed. He could continue about his work on the Bench. Candidates would enter specifically against a man on the Bench whose record had not been good.

The Committee on Judiciary and Legal Reform submitted a report to the Executive Committee at this meeting strongly opposing S. B. 4357, introduced in the 71st Congress, second session, by U. S. Senator Norris. The object of this bill is to take away from the Federal District Courts the jurisdiction based on diversity of citizenship. "The United States District Courts," says the committee's report, "have for many years administered justice fairly and impartially, and it is the opinion of your committee that it would be unwise and highly inadvisable to limit the jurisdiction of these courts as is contemplated by Senate Bill 4357. The passage of this bill would take from the United States District Court of this district, for instance, one-third of its business."

Oklahoma

State Bar of Oklahoma Holds Annual Meeting

The State Bar of Oklahoma held its first annual meeting in Oklahoma City, on December 19th and 20th, 1930; this was the first annual meeting of the re-

HON. ALGER MELTON
President, State Bar of Oklahoma

cently incorporated state bar. A special meeting was held in February of this year, jointly with the old voluntary bar association, which ceased to function at that time.

The session was opened by an address of welcome by Hal C. Thurman, president of the Oklahoma City bar association, with a response by Judge Benjamin Martin of Muskogee. The annual address was given by President J. R. Keaton.

Out-of-the-state speakers on the program were Dean Henry M. Bates of Ann Arbor, whose address upon "Tendencies of American Constitutional Law" was well received by all present, and Honorable R. M. Perkins of Iowa City, Iowa, whose address upon "The Work of the American Law Institute" was greatly appreciated, especially since the Oklahoma State Bar is very much interested in this special work.

The Oklahoma State Bar was much honored by the presence of the Honorable Charles A. Boston, President of the American Bar Association, who delivered the main address of the meeting, at the Oklahoma City Central High School Auditorium. The public was invited. Mr. Boston outlined the work of the American Bar Association and spoke of various problems its various committees and sections were grappling with. One of the greatest of these problems, he said, was the coordination of the American Bar Association and the various State Bars.

Other able addresses and papers were: "The Criminal Court of Appeals, Its History and Functions," by Hon. Thos. A. Edwards, presiding Judge; "Oil Production under State Control," by Philip Kates of Tulsa; "The Doctor and the Lawyer as Citizens," by Dr. A. L. Blesh of Oklahoma City; "The Supreme Court of Oklahoma," by Associate Justice James B. Cullison of the Oklahoma Supreme Court.

Hon. Alger Melton, of Chickasha, made a full and comprehensive report of the work accomplished by the Board of Governors of the State Bar, since its inception in October, 1929.

Committee reports were as follows: American Citizenship, by Barritt O. Galloway of Oklahoma City; Delegates to American Bar Association, by H. L. Fogg of El Reno and R. T. Stinson of Durant; Oklahoma Annotations to Contracts, by Stewart Lynch of Tulsa; Judicial Reform, by Thos. H. Owen of Oklahoma City; Legal Education and Admission to Bar, by Dean Julien C. Monnet of Norman; State Bar Examiners, by Ray McNaughton of Miami; Judicial Council, by Walter A. Lybrand of Oklahoma; Necrology, by A. W. Rigsby of Oklahoma City; and Treasurer, by F. B. H. Spellman, of Alva.

One of the new features of the meeting was the plan of having a separate luncheon for each Supreme Court Judicial District, presided over by the Governor representing each particular district. These luncheons were well attended and many topics of interest were discussed. The Supreme Court Justices representing each district were guests.

The following officers were elected for the ensuing year: Alger Melton, Chickasha, President; Edgar A. deMeules, Tulsa, 1st Vice-president; Horace G. McKeever, Enid, 2nd Vice-president; W. E. Utterback, Durant, 3rd Vice-President; F. B. H. Spellman, Alva, Treasurer and Editor-in-Chief of Oklahoma State Bar Journal; A. W. Rigsby, Oklahoma City, Secretary.

The following constitute the Board of Governors for the ensuing year: Alger Melton, Chickasha; Edgar A. deMeules, Tulsa; Horace G. McKeever, Enid; W. E. Utterback, Durant; F. B. H. Spellman, Alva; D. A. Richardson, Oklahoma City; Vern E. Thompson, Miami; Allen Wright, McAlester; H. C. Potterf, Ardmore; Grover C. Spillers, Tulsa; Charles A. Dickson, Okmulgee; C. Guy Cutlip, Wewoka; and Sam Massingale, Cordell.

It was conceded by all that this was one of the best meetings of the bar ever held in Oklahoma City, there was a much larger number of lawyers in attendance than ever before and a greater interest was taken by all in attendance than ever before.

The Oklahoma State Bar is working for a judicial council and for judicial reform, and for other advancements in the science of jurisprudence, as well as attempting to raise the standards of its members.

A. W. RIGSBY, Secretary.

Texas

American Bar Officials Guests of Dallas Association

New officers of the Bar Association of Dallas, Tex., were installed at the annual banquet and installation ceremony of that organization, held on the evening of Jan. 12. The officers are: President, W. L. Thornton; Vice-Presidents, Frank M. Ryburn, Pinkney Grissom and Hobert Price; Secretary-Treasurer, Roy C. Ledbetter.

The occasion was made more interesting by the presence of more than twenty officials of the American Bar Association and the National Conference of Commissioners on Uniform State Laws, who attended as guests of honor. These officials afterward left for Houston, where the mid-winter meeting of the Executive Committee of the American Bar Association was scheduled to begin on Jan. 13.

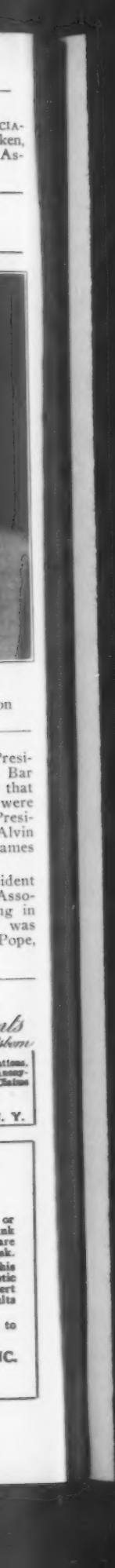
Mr. Harry P. Lawther made the address of welcome and President Boston replied. The other speakers, who were introduced by Hon. R. E. L. Saner, former President of the American Bar Association, were: Hon. William M. Hargest, of Harrisburg, Penn., President of the Conference of Commissioners on Uniform State Laws; Hon. Edgar B. Tolman, of Chicago, Editor-in-Chief of the AMERICAN BAR ASSOCIATION JOURNAL; William P. MacCracken, Jr., Secretary of the American Bar Association.

Miscellaneous

HON. JOSEPH W. JAMISON
President, Missouri Bar Association

R. K. Ramsey, Sr., was elected President of the Erie County (Ohio) Bar Association at a recent meeting of that organization. Other officers chosen were as follows: C. E. Forhman, Vice-President; Ray F. Spears, Secretary; Alvin F. Weichel, Treasurer, and James Moore and Peter Catri, Trustees.

Todd C. Storer was elected President of the Pueblo County (Col.) Bar Association at the Association's meeting in December. Benjamin F. Koperlik was named Vice-President and O. G. Pope, Secretary-Treasurer.



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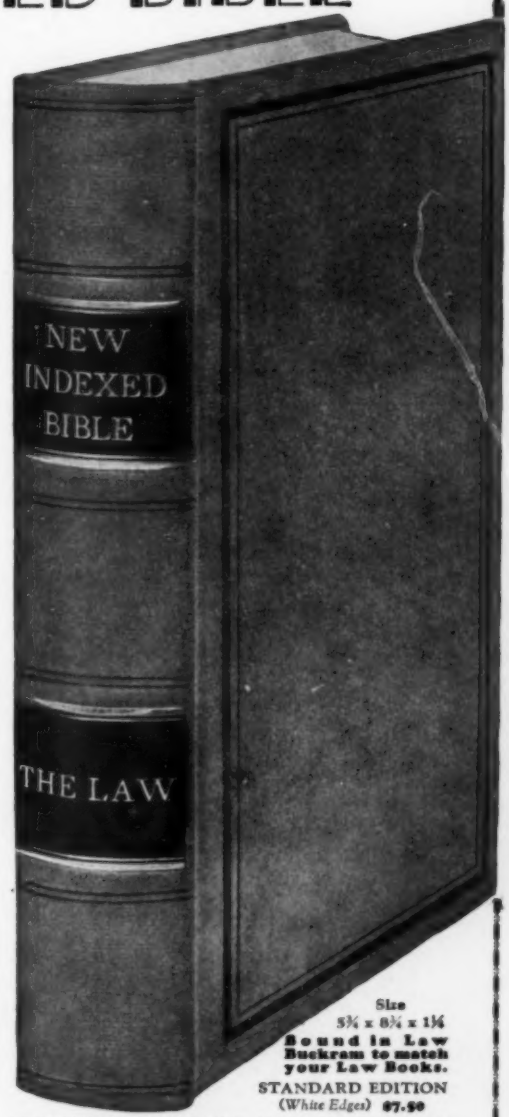

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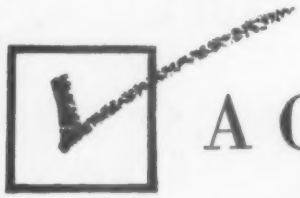

A Case of a Posthumous Child

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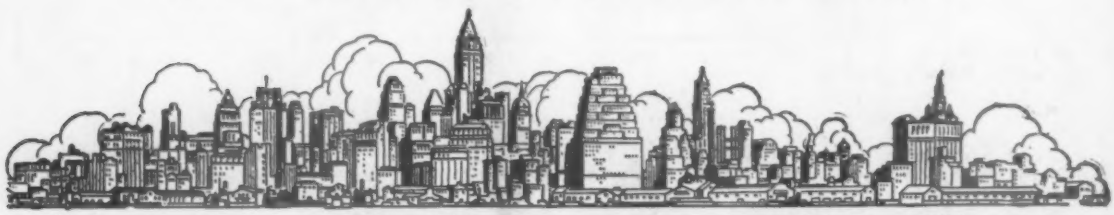

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